

# ACTIVE SYMBOLS

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**Abstract:** Visual representations of religious symbols continue to puzzle judges. Lacking empirical data on how images communicate, courts routinely dismiss visual religious symbols as “passive.” This Article challenges the notion that symbols are passive, introducing insights from cognitive neuroscience research to Establishment Clause theory and doctrine. It argues that visual symbolic messages can be at least as active as textual messages. Therefore, religious messages should be assessed in a medium-neutral manner in terms of their communicative impact, that is, irrespective of their textual or visual form. Providing a new conceptual framework for assessing religious symbolic messages, this Article reconceptualizes coercion and endorsement—the dominant competing approaches to symbolic messages in Establishment Clause theory—as matters of degree on a spectrum of communicative impact. This focus on communicative impact reconciles the approaches to symbolic speech in the Free Speech and Establishment Clause contexts and allows Establishment Clause theory to more accurately account for underlying normative concerns.

## INTRODUCTION

*It's no help to the cause of constitutional interpretation that religion is an emotional subject and that there is no systematic evidence of the social, political, psychological, cultural, ethical, or indeed religious consequences of the display of religious symbols in today's United States. Here as elsewhere evidence-based law remains a dream.*

—Judge Richard Posner<sup>1</sup>

Consider two public school graduation ceremonies. During the first ceremony, held at the school, an invited member of the clergy steps onto the stage

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<sup>1</sup> Doe *ex rel.* Doe v. Elmbrook Sch. Dist. (*Elmbrook II*), 687 F.3d 840, 873 (7th Cir. 2012) (en banc) (Posner, J., dissenting).

and offers an invocation and benediction—both are nonsectarian.<sup>2</sup> The second graduation ceremony is held not in the school building but rather “in the main sanctuary of . . . a local Christian evangelical and non-denominational” church where “[a]n enormous Latin cross, fixed to the wall, hangs over the dais and dominates the proceedings.”<sup>3</sup> But none of the participants engage in prayer or make any reference to the cross, other religious symbols present in the church, or religion generally.

The U.S. Supreme Court held that the first scenario was unconstitutional as a violation of the Establishment Clause in *Lee v. Weisman*.<sup>4</sup> The second scenario, conversely, was initially upheld by a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit—the first federal appellate court to rule on the constitutionality of the practice of holding public school graduation ceremonies in houses of worship—against an Establishment Clause challenge.<sup>5</sup> The Seventh Circuit later reversed en banc, but over strong dissents from judges Ripple, Easterbrook, and Posner.<sup>6</sup>

Do religious *symbols* communicate messages differently than religious *words* in prayer or scripture? Courts have repeatedly dismissed visual representations of religious symbols as merely “passive,” crafting a distinction between the visual and the textual that significantly underestimates the communicative power of the former. This suggests that courts deem visual religious displays less powerful, and therefore, less constitutionally suspect than textual religious messages. Are religious visual symbols more benign than prayer because they are merely “passive”? This question—fundamentally important both for Establishment Clause theory and doctrine—remains underexplored in the literature.

This Article argues that characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound. Nevertheless, this remains a common approach in the courts. As an empirical matter, judges erroneously ascribe a passive quality to visual displays; this is largely based on incorrect assumptions about how visual images communicate.<sup>7</sup> Courts

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<sup>2</sup> *Lee v. Weisman*, 505 U.S. 577, 581–84 (1992).

<sup>3</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist. (Elmbrook I)*, 658 F.3d 710, 712–13, 715 (7th Cir. 2011), *rev'd en banc*, 687 F.3d 840 (7th Cir. 2012).

<sup>4</sup> *Lee*, 505 U.S. at 586.

<sup>5</sup> *See Elmbrook I*, 658 F.3d at 712.

<sup>6</sup> *Elmbrook II*, 687 F.3d at 843; *id.* at 861 (Ripple, J., dissenting); *id.* at 869 (Easterbrook, C.J., dissenting); *id.* at 872 (Posner, J., dissenting).

<sup>7</sup> *See infra* notes 138–238 and accompanying text. Assessing the difference between the textual and the visual is not just an Establishment Clause concern. *See, e.g.*, Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. (forthcoming 2014) (manuscript at 2), *available at* <http://ssrn.com/abstract=2258742>, *archived at* <http://perma.cc/7DD7-TAE9> (discussing “the new trend of compelled visual speech” and its First Amendment implications). Beyond the First Amendment, the role of the visual recently has received attention in areas such as evidence, copyright, and trademark law.

tend to assume a lower intensity of communicative impact when religious symbols are at issue than when spoken or written religious words are at issue, manifesting a hierarchical binary: text is presumed active and privileged over images which are merely passive.<sup>8</sup> In doing so, this Article argues, the courts have it exactly backwards.

In contrast to the Establishment Clause context, courts have made incipient efforts in the speech context to evaluate the distinctions between the textual and the visual.<sup>9</sup> The notion that certain visual expressions are “passive” is challenged in the speech cases, putting into stark contrast the recognized power of images in these cases with the “passive” designation in cases involving visual religious symbols. To moderate that disconnect, this Article makes the case for more symmetry within the First Amendment as it concerns empirical claims regarding the perception of visual symbols.

The novelty of the approach to visual symbols presented in this Article lies in the insight that by neglecting the difference between the textual and the visual, Establishment Clause theory and doctrine overlook a distinction that is important for assessing the communicative impact of the message. Unlike other approaches that prefer to textualize the symbols or do not explicitly distinguish between the visual and the textual,<sup>10</sup> this Article argues that the inquiry best starts with the visual image. First, as an empirical matter, how do images—and, by extension, visual representations of religious symbols—communicate? Second, as a matter

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*See, e.g.,* NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* 104 (2009) (discussing the role of visuals in evidence law); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1385–86 (2011) (discussing the purposes of visual symbols in the context of trademark law); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (discussing the effects of “competing factual perceptions” in evidence law); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687 (2012) (discussing images in the context of copyright law).

<sup>8</sup> *See generally* JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak, trans., The Johns Hopkins Univ. Press, rev. ed. 1998) (1967) (discussing the historical hierarchical binaries that dominate Western thought, including that between the active and the passive). Scholars have observed this phenomenon in other speech contexts as well. *See, e.g.,* Corbin, *supra* note 7, at 24–25 (discussing compelled speech and the reason/emotion binary).

<sup>9</sup> *See, e.g.,* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2750–51 (2011) (Alito, J., concurring in the judgment) (discussing the difference between written materials and violent video games); *id.* at 2768–69 (Breyer, J., dissenting) (distinguishing video games from more passive forms of media); *see also* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211–13 (D.C. Cir. 2012) (discussing textual and visual warning statements on cigarette packages).

<sup>10</sup> *See, e.g.,* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 493 (2005) (textualizing visual images); Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1016 (2005) (initially focusing on the religious objects and symbols); Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1130–34 (2010) (not explicitly distinguishing between the visual and the textual).

of cultural interpretation, what do symbols mean? This second step of the analysis draws from the existing literature on the interpretation of religious symbols.<sup>11</sup> Although some have observed that courts fail to appreciate the power of symbols, placing them at “the bottom of the speech hierarchy,”<sup>12</sup> the visual nature of religious symbols remains underexamined. Scholars have occasionally criticized the characterization of religious symbols as “passive.”<sup>13</sup> But what is noticeably absent from the literature critical of the “passive” characterization is an empirical assessment of whether it is descriptively accurate; this Article concludes that it is not.

That religious symbolic images are powerful is not a new insight; the bouts of iconoclasm during the Protestant Reformation in the sixteenth century, for instance, suggest as much. But engaging the power of images and the power of words equally in what this Article calls a “medium-neutral approach” is necessary to strike the correct normative balance in Establishment Clause theory.

This Article proceeds from the normative premise that the State may not adopt a religious identity; it may neither determine its own religious preference nor communicate such a preference to its citizens.<sup>14</sup> The underlying concern is to avoid harm resulting from excluding groups of citizens from fully engaging in democratic participation, an interest grounded in political theory considerations. All citizens, regardless of religious affiliation or lack thereof, will rely on the state’s responsiveness to their concerns. In the free speech context, Robert Post articulated the value of participatory democracy as allowing citizens to “experience the value of self-government.”<sup>15</sup> Similar considerations obtain with respect to nonestablishment: “[e]very group must be able to compete for political influence and participate in determining a society’s identity and goals and the means to achieve them.”<sup>16</sup> This is particularly important in a democratic society with increasing religious pluralism, both among religious groups and

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<sup>11</sup> See *infra* notes 239–299 and accompanying text.

<sup>12</sup> Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2394 (2004).

<sup>13</sup> See, e.g., Ravitch, *supra* note 10, at 1016 (asserting that “there is no such thing as a ‘passive’ religious object or symbol”); Strasser, *supra* note 10, at 1124 (criticizing the lack of clarity in judicial uses of the term).

<sup>14</sup> See Charles Taylor, *The Meaning of Secularism*, HEDGEHOG REV., Fall 2010, at 23, 23 (stating that “no religious outlook or (religious or areligious) *Weltanschauung* can enjoy a privileged status, let alone be adopted as the official view of the state”).

<sup>15</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011). The objective of participation under this theory is “making government responsive to their views.” *Id.* at 484. Each citizen must equally have the opportunity to participate; indeed, this equal opportunity is deemed “vital to the legitimacy of the entire legal system.” James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498 (2011).

<sup>16</sup> Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991, 1061 (2012).

between religion and nonreligion. When the State assumes its own religious identity, it jeopardizes this fundamental value.

This Article proceeds in a descriptive, an empirical-analytic, and a prescriptive part. Part I explicates the two dominant approaches to Establishment Clause questions involving symbolic communicative acts—coercion and endorsement.<sup>17</sup> The prevailing current theory conceives of coercion and endorsement as different in kind. This Part then explains how the notion of “passive” symbols maps onto these two central theories. It demonstrates that the passive quality courts ascribe to religious symbols operates in a constitutionally relevant manner. But the notion that visual religious symbols are passive—in contrast to textual religious messages—is based on a misconception about the communicative power of images. Judicial assessments of visual religious symbols are missing important empirical information about how visual images communicate. Yet, empirical evidence is readily available.

Part II imports cognitive neuroscience literature<sup>18</sup>—both as primary source material and as applied to other areas of the law (in what is sometimes described as the emerging field of “neurolaw”<sup>19</sup>)—into Establishment Clause theory.<sup>20</sup> As this Part explains, empirical evidence from the field of cognitive neuroscience teaches us that the human brain processes words and images differently. Images are processed at higher rates than textual components and they are more directly linked to emotion than text.<sup>21</sup> Visual symbolic messages

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<sup>17</sup> See *infra* notes 24–137 and accompanying text.

<sup>18</sup> Cognitive neuroscience emerged in the 1990s as a result of combining psychology with the functional analysis of the brain made possible by technological advances in brain imaging. See Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61, 63–65 (2010).

<sup>19</sup> Neurolaw is the combined study of law and neuroscience. *Id.* at 63–65 (providing a brief overview of the development of neurolaw). Insights from neuroscience are increasingly playing a role in the legal field, both in case law and legal academic literature. See, e.g., *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2768 (Breyer, J., dissenting) (discussing neuroscience data); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (discussing “brain science”); Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119, 1134–35 (2010); Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 366–68 (2012); Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 815–16 (2012); Erez Reuveni, *Copyright, Neuroscience, and Creativity*, 64 ALA. L. REV. 735, 738 (2013); Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1203–04 (2010); Lois A. Weithorn, *Developmental Neuroscience, Children’s Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1537–41 (2012); Dominique J. Church, Note, *Neuroscience in the Courtroom: An International Concern*, 53 WM. & MARY L. REV. 1825, 1831–40 (2012). See generally NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland ed., 2004) (providing a report and commissioned papers discussing the relationship between neuroscience and the law); Kevin Davis, *Brain Trials*, A.B.A. J., Nov. 2012, at 37, 42 (providing a perspective on neuroscience in the courtroom).

<sup>20</sup> See *infra* notes 151–187 and accompanying text.

<sup>21</sup> See *infra* notes 151–187 and accompanying text.

therefore can be at least as active as textual symbolic messages. Further, this Part analyzes how these characteristics of visual images implicate constitutional analysis in the speech context. There, several Supreme Court opinions display a—largely intuitive—assessment of the visual and textual that indicates a higher sensitivity to the communicative power of images than in the Establishment Clause context. Finally, this Part distinguishes the empirical claim—how images communicate—from the cultural interpretation of what symbols mean.

Part III explains what these insights mean as a prescriptive matter for Establishment Clause theory and, more broadly, First Amendment approaches to visual symbols.<sup>22</sup> It makes three discrete contributions to First Amendment theory, both in the Free Speech and the Establishment Clause context. First, the theoretical and doctrinal approach to religious symbols ought to be reassessed in light of the empirical evidence on how images communicate. The characterization of religious symbols as “passive” is inaccurate, so at a minimum, the prescriptive lesson is to abandon it and treat visual representations of religious symbols the same as spoken or written religious texts. Second, contributing to greater symmetry within the First Amendment, this Part moves to reconcile the treatment of visual symbolic messages in Free Speech and Establishment Clause theory by shifting the focus to communicative impact. Third, having abandoned the active/passive distinction, the evaluation of religious symbolic messages—like that of textual messages—ought to be conceptualized according to their communicative impact, irrespective of the medium by which they are conveyed. This Part provides a novel conceptual framework for doing so. Within the communicative impact framework, in which endorsement and coercion are reconceptualized as matters of degree rather than kind, the medium-neutral focus on communicative impact allows us to more accurately account for the underlying theoretical concerns of the Establishment Clause. The foundational normative concern is that the State may not take on its own religious identity, and therefore may also not communicate its own religious preference. For such a communicative act expressing the state’s religious identity or preference, the medium used to convey the message is secondary to its communicative impact.

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<sup>22</sup> See *infra* notes 300–364 and accompanying text.

## I. FROM WORDS TO IMAGES

Although law traditionally has been mostly concerned with texts,<sup>23</sup> the cultural—and therefore also legal—significance of visuals has increased quite dramatically.<sup>24</sup> This increased significance of visuals is reflected in the Establishment Clause context. The two graduation scenarios used in the introductory example illustrate a shift in Establishment Clause litigation over time: from a focus on words to images; from a focus on the textual to the visual.<sup>25</sup>

In the Supreme Court, the first Establishment Clause cases were about money,<sup>26</sup> then spoken prayers and devotional Bible readings.<sup>27</sup> Over time, disputes increasingly involved public displays of religious messages. Among these were textual displays, such as the Ten Commandments, and nontextual displays.<sup>28</sup> The first two iconic Supreme Court cases involving nontextual religious imagery in Christmas displays, decided in the 1980s, were *Lynch v. Donnelly* and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>29</sup> More recently, the Supreme Court confronted the display of a Latin cross directly in

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<sup>23</sup> See Christina Spiesel, *Reflections on Reading: Words and Pictures and Law*, in LAW, MIND AND BRAIN 391, 391 (Michael Freeman & Oliver R. Goodenough eds., 2009) (“[Law] has thought of itself as pre-eminently about the use of words and their linear logics.”).

<sup>24</sup> FEIGENSON & SPIESEL, *supra* note 7, at 10 (asserting that “our culture, and increasingly now the law as well—has gone visual”); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 787 (2001) (discussing the “rapid transmission of pictures and symbols around the globe” and its “sweeping consequences for mass societies, far beyond its effect on law in general, or upon the small corner of Religion Clause law in particular”).

<sup>25</sup> Cf. Lupu, *supra* note 24, at 788 (“In a fast-moving political culture in which visual images dominate public focus, public controversy over matters of government speech about religion can be expected to take precedence over issues of government money in support of religion.”).

<sup>26</sup> See *Bradfield v. Roberts*, 175 U.S. 291, 292–93 (1899) (holding that congressional funding for a Roman Catholic hospital in Washington, D.C. was permissible).

<sup>27</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (holding that state law authorizing a one-minute period of silence for prayer or meditation at the beginning of the school day violated the Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that a state action requiring Bible passages be read at the opening of the school day violated the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 422–24 (1962) (holding that public school prayer violated Establishment Clause).

<sup>28</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 858 (2005) (holding unconstitutional a Ten Commandments display in a courthouse); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality opinion) (holding constitutional a Ten Commandments display on the grounds of the Texas Capitol); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (per curiam) (holding unconstitutional a Ten Commandments display in school classrooms); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that no First Amendment claim to forum access existed for a religious display in a park that contained Ten Commandments).

<sup>29</sup> *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989) (holding unconstitutional a Christmas display featuring crèche in a courthouse, while holding constitutional a Christmas display featuring a Christmas tree and menorah on public property); *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (holding constitutional a Christmas display featuring a crèche on public property).

a case involving a veterans' memorial in the Mojave Desert.<sup>30</sup> The Court has since denied certiorari in two other cases involving the Latin cross.<sup>31</sup>

As the role of religious symbols became more controversial, such cases became more salient.<sup>32</sup> But the approach to visual symbols remains under-theorized and subject to criticism.<sup>33</sup> The Supreme Court most recently revisited the Establishment Clause in a textual speech case, upholding the practice of legislative prayer at town board meetings.<sup>34</sup> The resulting doctrinal parameters must take account of symbolic messages in future cases. Indeed, a challenge in the *Elmbrook* graduation-at-church case is already before the Court.<sup>35</sup> Disputes over symbols will continue to arise, forcing courts to engage the power of visuals.

### A. Coercion and Endorsement as Distinct in Kind

The key divide in theoretical and doctrinal approaches to the Establishment Clause remains that between coercion and endorsement.<sup>36</sup> The doctrinal fundamentals with respect to religious symbols are relatively simple, but increasingly contested. The primary doctrinal basis remains the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*.<sup>37</sup> Justice Sandra Day

<sup>30</sup> *Salazar v. Buono*, 559 U.S. 700, 706 (2010); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that a First Amendment claim to forum access existed for a cross display).

<sup>31</sup> See *Mount Soledad Mem'l Ass'n v. Trunk (Trunk IV)*, 132 S. Ct. 2535, 2535 (2012) (denying certiorari on a case where the Ninth Circuit held that the Mount Soledad war memorial violated the Establishment Clause); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 12 (2011) (denying certiorari where the Tenth Circuit held that memorial crosses next to highways were unconstitutional).

<sup>32</sup> Cf. 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 74 (2008) (suggesting as the underlying reason that cases involving religious texts and symbols in public places did not reach the Supreme Court until 1980 "that various long-standing practices reflecting a Christian point of view have grown to seem more problematic than they had to earlier generations").

<sup>33</sup> See, e.g., *Utah Highway*, 132 S. Ct. at 22 (Thomas, J., dissenting from denial of cert.) (noting in the context of Establishment Clause cases involving religious symbols, that "it is difficult to imagine an area of the law more in need of clarity").

<sup>34</sup> See *Town of Greece v. Galloway*, No. 12-696, slip op. at 1 (U.S. May 5, 2014).

<sup>35</sup> See Petition for a Writ of Certiorari at 1, *Elmbrook II*, 687 F.3d 840 (No. 12-755), 2012 WL 6693652, at \*1. One of the questions presented in the *Elmbrook* petition to the Supreme Court is: "[w]hether the government 'coerces' religious activity . . . where there is no pressure to engage in a religious practice or activity, but merely exposure to religious symbols." *Id.* at \*i.

<sup>36</sup> There are other tests and standards used in Establishment Clause adjudication. See 2 GREENAWALT, *supra* note 32, at 157–93. This Article focuses on coercion and endorsement because they are the predominant approaches to communicative acts. The active/passive distinction is most salient for the two categories—coercive action and symbolic endorsement—created by these inquiries. For a discussion of the tests and standards used, see 2 GREENAWALT, *supra* note 32, at 157–93.

<sup>37</sup> 403 U.S. 602, 612–13 (1971). The classic formula of this three-prong test states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government



O'Connor subsequently conceived the endorsement test as a clarification of the *Lemon* test in cases involving visual religious displays, such as a nativity scene and a Latin cross.<sup>38</sup> But the coercion and endorsement approaches also constitute larger, competing theories underlying the Establishment Clause. Thus far, Establishment Clause theory typically treats coercion and endorsement as different in kind.<sup>39</sup>

The endorsement test inquires whether—from the perspective of a reasonable observer—the State endorses (or condemns) a religious practice.<sup>40</sup> Its normative basis is grounded in political theory: the harm against which the Establishment Clause is designed to protect is “send[ing] a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>41</sup>

The other major approach is the coercion inquiry. Justice Antonin Scalia in *McCreary County v. ACLU of Kentucky* and Justice Anthony Kennedy in *County of Allegheny* expressed a preference for applying a coercion theory in cases involving religious symbols.<sup>42</sup> But the coercion inquiry has taken different forms depending on the interpretive scope of coercion. Michael McConnell has described “religious coercion as the fundamental evil against which the [Establishment] [C]lause is directed.”<sup>43</sup> The coercion inquiry will find a practice with “coercive impact”<sup>44</sup> unconstitutional, and for some, only a coercive practice will violate the Establishment Clause.<sup>45</sup> Christmas displays, for exam-

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entanglement with religion.” *Id.* at 612–13 (citations omitted) (internal quotation marks omitted). Though much maligned, the Court never explicitly overruled the *Lemon* test; it did, however, choose not employ the test in several cases involving religious displays. *See, e.g., Utah Highway*, 132 S. Ct. at 21 (Thomas, J., dissenting from denial of cert.) (asserting that “five sitting Justices have questioned or decried the *Lemon*/endorsement test’s continued use”); *McCreary Cnty.*, 545 U.S. at 861 (declining to abandon the *Lemon* test); *Van Orden*, 545 U.S. at 686–87 (plurality opinion) (noting that the *Lemon* test is “not useful in dealing with the . . . passive monument”).

<sup>38</sup> *See Pinette*, 515 U.S. at 772 (O’Connor, J., concurring) (discussing the endorsement test in a case concerning a Latin cross); *Lynch*, 465 U.S. at 688–89 (O’Connor, J., concurring) (discussing the endorsement test in a case concerning a nativity scene). Although the endorsement test as originally proposed combines the first two prongs of the *Lemon* test, it has since arguably developed into a competing theory. *See* 2 GREENAWALT, *supra* note 32, at 46.

<sup>39</sup> *See infra* notes 40–59 and accompanying text.

<sup>40</sup> *See Pinette*, 515 U.S. at 780–81 (O’Connor, J., concurring); *Cnty. of Allegheny*, 492 U.S. at 620.

<sup>41</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

<sup>42</sup> *McCreary Cnty.*, 545 U.S. at 908–09 (Scalia, J., dissenting); *Cnty. of Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

<sup>43</sup> Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 937 (“If Madison’s explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment.”).

ple, though “manifestations of religion in public life,” are constitutional under this theory because they “entail no use of the taxing power and have no coercive effect.”<sup>46</sup> The coercion theory arguably is on the rise in the Supreme Court.<sup>47</sup> The problem, of course, is to determine the meaning of “coercion.”<sup>48</sup>

Contrasting Justice Kennedy’s majority opinion and Justice Scalia’s dissent in *Lee*, the school prayer case used in the introductory example, illustrates the possible scope of coercion. Starting from the premise that the Establishment Clause prohibits coercion into participation or support of “religion or its exercise,”<sup>49</sup> Justice Kennedy’s interpretation of coercion encompasses “public pressure” and “peer pressure” on students attending a graduation ceremony to stand silently during prayer.<sup>50</sup> By contrast, Justice Scalia’s dissent rejects the idea of “psychological coercion.”<sup>51</sup> He suggests that the historical understanding of the Establishment Clause prohibited “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”<sup>52</sup> In addition, Justice Scalia deems impermissible state endorsement of divisive sectarian positions; nondenominational prayers, however, are permissible.<sup>53</sup> Importantly, he points out that in *Lee* “no one [was] legally coerced to recite [prayers]” — thus making compelled activity of the audience a key element of his understanding of coercion.<sup>54</sup> For a majority of the Supreme Court Justices and scholars, however, a lack of coercion does not necessarily result in a finding of constitutionality.<sup>55</sup>

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<sup>46</sup> *Id.* at 939.

<sup>47</sup> See, e.g., Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1252 (2011) (“The Court’s new majority may be edging towards a holding that government is free to promote Christianity as long as it does so noncoercively.”); cf. *Greece*, No. 12-696, slip op. at 21–22 (relying primarily on the coercion theory). The decision in *Town of Greece v. Galloway* displayed a difference in the definition of coercion between the opinion for the Court authored by Justice Kennedy—joined in relevant Part II-B by Chief Justice John Roberts and Justice Samuel Alito—and the concurrence authored by Justice Clarence Thomas and joined, in relevant Part II, by Justice Scalia. Compare *id.* at 22 (noting that coercion does not arise when the prayers at question “neither chastised dissenters nor attempted lengthy disquisition on religious dogma”), with *id.* at 7 (Thomas, J., concurring) (defining coercion in the Establishment Clause context as “actual legal coercion . . . not the ‘subtle coercive pressures’ allegedly felt by respondents in this case”). This reflects Justice Kennedy’s and Justice Scalia’s diverging understandings of coercion. See *infra* notes 49–59 and accompanying text.

<sup>48</sup> Cf. McConnell, *supra* note 43, at 941 (declining to offer a definition).

<sup>49</sup> *Lee*, 505 U.S. at 587.

<sup>50</sup> *Id.* at 593 (“This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

<sup>51</sup> *Id.* at 636–39 (Scalia, J., dissenting).

<sup>52</sup> *Id.* at 640.

<sup>53</sup> *Id.* at 641.

<sup>54</sup> *Id.* at 641–42.

<sup>55</sup> See *id.* at 604 (Blackmun, J., concurring) (“The Court has repeatedly recognized that a violation of the Establishment Clause is not predicated on coercion.”); 2 GREENAWALT, *supra* note 32, at 157.

Coercion as envisioned by Justice Scalia is a different category of infringement than endorsement. Justice Scalia's version arguably makes the Establishment Clause redundant because the types of infringement he discusses—compelled church attendance, disadvantages for dissenters, and the like<sup>56</sup>—are impermissible as a matter of free exercise.<sup>57</sup> This is a categorically different harm than that caused by state endorsement of religion that does not violate an individual's right to free exercise. As the contrast between Justice Kennedy's and Justice Scalia's interpretations of coercion in *Lee* shows, coercion can indicate a wider or narrower category of state actions prohibited under the Establishment Clause. Although Justice Kennedy expressed a preference for an underlying theory of coercion,<sup>58</sup> it is difficult to uphold a categorical distinction between coercion and endorsement in light of his interpretation. Indeed, Justice Kennedy's interpretation of coercion approximates endorsement, whereas Justice Scalia maintains that there is "no warrant for expanding the concept of coercion beyond acts backed by threat of penalty."<sup>59</sup> These variations are only necessary if one follows the theory that Establishment Clause violations are only possible as a matter of coercion and that coercion and endorsement are different in kind. But even if this line can be drawn with some clarity, the resulting categories do not pay sufficient respect to the subtle shifts in communicative impact that religious messages can have.

### B. Visual Communication and Passivity

What do courts mean when they characterize a visual religious symbol as "passive"? Is "passive" always synonymous with "noncoercive"? Courts, as a doctrinal matter, typically use the endorsement test for evaluating religious symbolic displays.<sup>60</sup> But a close reading of the relevant cases reveals that judges are most likely to use the "passive" label in opinions upholding the displays in question, signaling in their reasoning that they are adopting a type of coercion inquiry that may or may not be made explicit.<sup>61</sup> This paradox—explicit use of the endorsement test and implicit assertion of noncoerciveness by applying the "passive" label—has significant traction in cases involving "passive symbols" and perhaps explains some of the confusion and unpredictability of outcomes in this area of the law. The distinction in kind between endorsement

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<sup>56</sup> See *Lee*, 505 U.S. at 640–41 (Scalia, J., dissenting).

<sup>57</sup> See *id.* at 621 (Souter, J., concurring) (arguing that this approach "would render the Establishment Clause a virtual nullity").

<sup>58</sup> See *id.* at 587 (majority opinion); *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>59</sup> *Lee*, 505 U.S. at 642 (Scalia, J., dissenting).

<sup>60</sup> See, e.g., *Cnty. of Allegheny*, 492 U.S. at 620 (employing the endorsement test).

<sup>61</sup> See *infra* notes 62–137 and accompanying text.

and coercion invites discarding visual images as passive, and the relevant case law indicates that courts are often amenable to this invitation.

Following an underlying coercion theory, judges will likely make a distinction between active and passive, where passive denotes “noncoercive.” Following an endorsement theory, however, such a distinction would be largely irrelevant. Thus, to the extent that “passive” merely is synonymous with “noncoercive,” it signals that the judge’s underlying Establishment Clause theory is in doctrinal opposition to the endorsement approach. But as one scholar notes, “[t]he psychological pressure to remain respectfully silent in the face of a symbol one finds objectionable” may in fact also have a “subtle coercive effect” on the observer.<sup>62</sup> This also suggests that the label “passive” is unlikely to describe the audience in a constitutionally relevant manner, because the audience is always free to remain silent (passive), as seen in *Lee*.<sup>63</sup> The basic idea of coercion is that individuals cannot be compelled to act; thus, it is unlikely that “passive” means passivity of the observer. It is more likely that it refers to the manner in which the symbol communicates its message.

It is difficult to discern how much analytical weight courts actually place on the designation of visuals as “passive.” A skeptic might contend that the term has no independent, constitutionally relevant meaning. If “passive” indeed served no purpose beyond embellishment, courts ought to immediately abandon it. A related line of criticism might suggest that the term “passive” does not neatly align with “visual.” As will be shown, more often than not, it does. And in any event, the underlying problem—the disparate treatment of textual and visual communication where courts assume a hierarchy that privileges the former—remains.

The following discussion proceeds from the premise that “passive” has independent meaning. The sheer frequency of its use and its pervasiveness in cases involving religious symbols—not only domestically but also abroad<sup>64</sup>—

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<sup>62</sup> Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIGION 1, 5 (2012).

<sup>63</sup> *Lee*, 505 U.S. at 593; cf. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a compulsory flag salute).

<sup>64</sup> See *Lautsi v. Italy*, App. No. 30814/06, at \*1, \*29 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>, archived at <http://perma.cc/Q4D3-ZMLZ>. Though this Article focuses solely on domestic developments, it is worth noting that foreign courts have also used the language of “passive symbols,” most prominently perhaps the European Court of Human Rights in 2011, in *Lautsi v. Italy*, where the court allowed classroom crucifixes in Italian public schools. See *id.* at \*31–32.

The Italian government argued that “[w]hatever the evocative power of an ‘image’ might be . . . it was a ‘passive symbol,’ whose impact on individuals was not comparable with the impact of ‘active conduct.’” *Id.* at \*16. Referencing an earlier decision of the German Federal Constitutional Court, the applicants conversely argued “[a]s to the assertion that it was merely a ‘passive symbol,’ this ignored the fact that like all symbols—and more than all others—it gave material form to a cognitive, intuitive and emotional reality which went beyond the immediately perceptible.” *Id.* at \*18. The Grand Cham-

suggest that it does. Indeed, “passive” is used to discard the communicative power of visuals. This hierarchical understanding of words and images, this Article argues, is ill-conceived.

The following Subsections explore how courts analyze visual religious iconography in comparison to textual religious messages in three contexts: religious imagery in public displays, the use of religious buildings for government-sponsored secular purposes, and the use of religious imagery in expressions of government identity.<sup>65</sup> The discussion reveals that the “passive” designation can plausibly function in two ways—alternatively or cumulatively—in order to justify disparate treatment of visuals and text. First, “passive” can denote an empirical claim regarding the manner in which visual images communicate. Passivity in this sense suggests less ability to communicate effectively than textual speech. Second, “passive” can denote a bundle of factors, including brief exposure to the symbol, a vague notion of minimal offensiveness, or other characteristics of the symbol that result in its presumed noncoerciveness. But these notions, unlike the empirical claim, go to the context and cultural meaning of the symbol. The empirical claim is false;<sup>66</sup> the cultural claim is complex and the “passive” designation is at best an ambiguous and misleading label.<sup>67</sup>

## 1. Religious Imagery in Public Displays

In *Lynch*—the progenitor case of visual symbolic religious displays—the Supreme Court upheld a holiday display on public property that featured a

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ber explicitly addressed the active/passive distinction, stating that a crucifix on a wall is an “essentially passive symbol and this point is of importance in the Court’s view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.” *Id.* at \*29.

Several concurring opinions also addressed the designation of the crucifix as a “passive” symbol. *See id.* at \*34–37 (Rozakis, J., concurring); *id.* at \*38–43 (Bonello, J., concurring); *id.* at \*44–46 (Power, J., concurring). The concurring opinion of Judge Ann Power agreed with the majority’s assessment of the crucifix as a passive symbol “insofar as the symbol’s passivity is not in any way coercive,” but her assessment was more nuanced. *See id.* at \*45 (Power, J., concurring). She “concede[d] that, in principle, symbols (whether religious, cultural or otherwise) are carriers of meaning. They may be silent but they may, nevertheless, speak volumes without, however, doing so in a coercive or in an indoctrinating manner.” *See id.* As she framed it, the question thus is not whether symbols can communicate like textual language—she asserts they can—but whether the message communicated is one that violates the negative religious freedom of the observer under the Convention. *See id.*; *see also* Haupt, *supra* note 16, at 1024–32 (discussing *Lautsi*).

<sup>65</sup> *See infra* notes 68–102 and accompanying text (religious imagery in public displays); *infra* notes 103–123 and accompanying text (religious buildings for government-sponsored secular purposes); *infra* notes 124–137 and accompanying text (religious imagery in expressions of government identity).

<sup>66</sup> *See infra* notes 151–187 and accompanying text.

<sup>67</sup> *See infra* notes 239–299 and accompanying text.

crèche among various other (nonreligious) elements.<sup>68</sup> Chief Justice Warren Burger stated “[t]he crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas.”<sup>69</sup> Further, he stated:

To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while Congress and Legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.<sup>70</sup>

In short, if spoken and sung textual messages are allowed, a “passive” visual message ought to be permissible as well. But comparing the crèche to a painting suggests that its visual nature plays some role. Although it might refer to the aesthetic interest the town might have in displaying the crèche—similar to the interest in displaying a painting<sup>71</sup>—it would be rather nonobvious to describe this aesthetic interest as “passive.”

In *County of Allegheny*, another Christmas display case, Justice Kennedy stated that “where the government’s act of recognition or accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement on religious liberty by passive or symbolic accommodation is minimal.”<sup>72</sup> In this context, “passive” describes the government’s posture towards the symbols; it does not describe the way the symbols communicate or the effect they have on observers.<sup>73</sup> But in the same case, Justice Kennedy uses “passive” to describe the display itself; this is more closely related to the visual character of the symbol.<sup>74</sup> Further, Justice Kennedy noted that “[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”<sup>75</sup> In this instance, the passive nature seems to indicate that the display itself does not “speak” and that the observer can easily avert exposure to its message.

<sup>68</sup> 645 U.S. at 685.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 686.

<sup>71</sup> *Cf.* 2 GREENAWALT, *supra* note 32, at 76 (offering this interpretation but finding it likewise unconvincing).

<sup>72</sup> 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

<sup>73</sup> *See id.* at 662–63 (“Noncoercive government action within the realm of flexible accommodation or passive acknowledgement of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”).

<sup>74</sup> *Id.* at 664 (“The crèche and the menorah are purely passive symbols of religious holidays.”).

<sup>75</sup> *Id.*

Thus, there are at least two (somewhat related) ways in which the “passive” designation operates: (1) to describe the relationship between the government and the symbol, indicating the manner in which the government recognizes religion (here, acknowledgment of religious practice); and (2) to describe the relationship between the symbol and its viewer (presumably, “not speaking”). The two are related to the extent that one assumes mere acknowledgment—rather than coercion or at least proselytizing—occurs when there is no textual message. In other words, visual messages, under this view, do not result in coercion. This designation, then, likely contains an empirical claim regarding the communicative power of images. Moreover, it is also possible to conceive different levels of “activity” of the visual symbolic message. And while it may be possible to avoid the message of a holiday display,<sup>76</sup> this is less easily accomplished in other settings.<sup>77</sup> This distinction hints at the different degrees of communicative impact that a symbolic message may have.<sup>78</sup>

The “passive” designation also appeared in the Supreme Court’s Ten Commandments cases. In *Stone v. Graham*, the Court found insignificant “that the Bible verses involved in this case are merely posted on the wall, rather than read aloud.”<sup>79</sup> Without overstating the significance of the distinction, it is interesting to note that text “read aloud” and text “posted on the wall” —the latter a more visual display<sup>80</sup>—are contrasted. This reference might allude to a difference in quality that the Court detects between spoken and silent (that is, “merely posted”) texts.<sup>81</sup> More importantly, then-Justice William Rehnquist referred in dissent to an earlier Decalogue case in which the Tenth Circuit characterized the monument as “passive,” which the court described as “involving no compulsion.”<sup>82</sup>

Almost twenty five years later, in *Van Orden*, Chief Justice Rehnquist picked up the “passive” characterization in upholding “[t]he placement of the Ten Commandments on the Texas State Capitol grounds,” which he described as “a far more passive use of those texts than was the case in *Stone*, where the

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<sup>76</sup> See *id.* Though some would dispute that this is possible at all. See *infra* notes 185–186 and accompanying text.

<sup>77</sup> See, *Stone*, 449 U.S. at 42 (holding unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in public school rooms).

<sup>78</sup> See *infra* notes 328–339 and accompanying text.

<sup>79</sup> *Stone*, 449 U.S. at 42.

<sup>80</sup> Cf. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012) (discussing printed text as graphic), *cert. denied*, 133 S. Ct. 1996 (2013).

<sup>81</sup> See *Stone*, 449 U.S. at 42.

<sup>82</sup> See *id.* at 46 (Rehnquist, J., dissenting) (“‘It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era.’” (quoting *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973))).

text confronted elementary school students every day.”<sup>83</sup> The use of “passive” in this context seems to take on a temporal dimension, in contrast to exposure “every day.”<sup>84</sup> This, however, is a rather nonobvious meaning of the term.<sup>85</sup> Conceivably, the intent to influence the students in *Stone* is much more direct than is the intent to influence the (occasional or frequent) passerby in *Van Orden*; yet, the monument remained in place whether observers walked past it or not. This difference might make sense in distinguishing a permanent display from a temporary display. But it is not immediately apparent what role characterizing the monument as “more passive” plays in distinguishing two permanent displays featuring identical textual messages.<sup>86</sup> The Chief Justice also distinguished the Ten Commandments monument in *Van Orden* from Bible reading and prayer in schools;<sup>87</sup> this aligns with an interpretation of text as active and visual images as passive. Moreover, he compared the monument to a wide variety of visual representations, all presumably as “passive” as the monument.<sup>88</sup> Judge J. Harvie Wilkinson III criticized the Chief Justice’s reliance on the characterization of the monuments as “passive,” stating that “Chief Justice Rehnquist’s adoption of ‘passivity’ as the plurality’s test for upholding public religious messages is no model of clarity.”<sup>89</sup>

In his dissent in *McCreary County*, Justice Scalia asserted that “[t]he passive display of the Ten Commandments, even standing alone, does not begin to [proselytize or advance any one faith or belief or apply some level of coercion].”<sup>90</sup> “Passive” here means “noncoercive.” He cited Justice Kennedy in *County of Allegheny* to illustrate the role of “passive” symbols.<sup>91</sup> But Justice Kennedy’s analysis in *County of Allegheny* made the connection between “pas-

<sup>83</sup> 545 U.S. at 691 (plurality opinion).

<sup>84</sup> See *id.*

<sup>85</sup> Cf. Strasser, *supra* note 10, at 1157 (criticizing the temporal dimension).

<sup>86</sup> See *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting). In his *Van Orden* dissent, Justice John Paul Stevens likewise asserted that “[t]he monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgement of religion.” See *id.* Additionally, in addressing the Chief Justice’s comparison with *Stone*, Justice David Souter stated that “[p]lacing a monument on the ground is not more ‘passive’ than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it.” *Id.* at 745 (Souter, J., dissenting).

<sup>87</sup> *Id.* at 691 (plurality opinion).

<sup>88</sup> See *id.* at 688–89 (comparing the monument in *Van Orden* to varied depictions of the Ten Commandments at numerous locations throughout Washington, D.C., including at the Supreme Court).

<sup>89</sup> J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1989 (2006); see also Dan M. Kahan, *The Supreme Court 2010 Term, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 68–69 (2011) (focusing on the passive designation in distinguishing outcomes in *Van Orden* and *McCreary County*).

<sup>90</sup> *McCreary Cnty.*, 545 U.S. at 909 (Scalia, J., dissenting).

<sup>91</sup> *Id.* at 909 (citing *Cnty. of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part)).



sive” and “noncoercive” less forcefully than did Justice Scalia. This, again, reflects Justice Kennedy’s wider understanding of coercion as seen in *Lee*.<sup>92</sup>

In the lower courts, the qualitative distinction between textual and visual messages—frequently dismissing the latter as passive—has likewise taken root.<sup>93</sup> Though some courts are suspicious of the “passive” designation, they find it empirically unclear how religious symbolic communication works and in which instances it constitutes a constitutional violation.<sup>94</sup> The long-running litigation involving the Mt. Soledad Cross in San Diego provides an illustration.<sup>95</sup> In its most recent iteration, the U.S. Court of Appeals for the Ninth Circuit held that the memorial’s current arrangement—which has a large Latin cross as its centerpiece—violated the Establishment Clause.<sup>96</sup> But it was the district court’s usage of the “passive” designation that is particularly illuminating.<sup>97</sup> After concluding that the Mt. Soledad Cross satisfied the *Lemon* test, the court conducted an inquiry into what it identified as one relevant factor: “whether [the monument] is passive or proselytizing in its effect.”<sup>98</sup> The “passive” designation was used in various other ways throughout the decision, including to describe the City of San Diego as an “absent and passive recipient” of the monument donated by a private group.<sup>99</sup> Yet, it is irrelevant to the message of the monument whether the municipality was “active” or “passive” in receiving the monument, except for the question of attribution of the message.<sup>100</sup> That determination does nothing to make the religious symbol itself

<sup>92</sup> See *supra* notes 49–50 and accompanying text.

<sup>93</sup> See, e.g., *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorusch, J., dissenting) (dissenting from denial of hearing en banc and characterizing the highway crosses at issue as “passive public displays”); *Donnelly v. Lynch*, 525 F. Supp. 1150, 1176 (D.R.I. 1981) (characterizing the nativity scene at issue as “passive”), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984).

<sup>94</sup> See, e.g., *Smith v. Lindstrom*, 699 F. Supp. 549, 567 (W.D. Va. 1988) (acknowledging that “the effect of well-crafted symbolic speech is anything but passive, quiet, or ineffective”).

<sup>95</sup> See *Trunk v. City of San Diego (Trunk I)*, 568 F. Supp. 2d 1199, 1203 (S.D. Ca. 2008), *rev’d*, *Trunk v. City of San Diego (Trunk II)*, 629 F.3d 1099 (9th Cir. 2011), *reh’g en banc denied*, *Trunk v. City of San Diego (Trunk III)*, 660 F.3d 1091 (9th Cir. 2011), *cert. denied sub nom.*, *Mount Soledad Mem’l Ass’n v. Trunk (Trunk IV)*, 132 S. Ct. 2535 (2012).

<sup>96</sup> *Trunk II*, 629 F.3d at 1129.

<sup>97</sup> See *Trunk I*, 568 F. Supp. 2d at 1218. The district court interpreted Ninth Circuit precedent—in particular the 2009 decision *Card v. City of Everett*—to extend the *Van Orden* holding beyond the Ten Commandments context to other passive displays. See *id.* at 1204, 1206 (citing *Card v. City of Everett*, 520 F.3d 1009, 1204 (9th Cir. 2008)). However, the district court’s reliance on *Card* is confounding; there is no clear indication that the *Card* opinion purports to extend *Van Orden* beyond its immediate context. See *Card*, 520 F.3d at 1018 (discussing the scope of *Van Orden*).

<sup>98</sup> *Trunk I*, 568 F. Supp. 2d at 1218.

<sup>99</sup> *Id.* at 1223.

<sup>100</sup> See Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 601–06 (2011) (discussing attribution of speech in cases of donation of religious monuments to municipalities).

passive. Turning finally to the assessment of “passive or proselytizing effect,” the district court distinguished the “passive” monuments in *Van Orden* from “other more confrontational displays which were meant to indoctrinate.”<sup>101</sup> The court noted that “[t]he gist of this observation is that passive monuments are less likely to violate the Establishment Clause.”<sup>102</sup> The court’s former observation suggests a noncoercive effect; the latter is circular, simply equating “passive” with “likely to pass constitutional muster.” Thus, what becomes clear is that the “passive” designation used by courts obfuscates rather than clarifies the manner in which visual religious symbols communicate.

## 2. Religious Buildings Used for Secular Purposes

Sometimes, secular functions are brought to sites dominated by religious symbols.<sup>103</sup> In several district court cases, school districts were barred from holding graduation ceremonies in churches.<sup>104</sup> The issue of high school graduations in church buildings has just now percolated through the federal courts. The Seventh Circuit decisions in *Elmbrook*, used in the introductory example, were the first time a federal appeals court addressed the issue.<sup>105</sup> A three-judge panel initially upheld the district court’s decision holding that the practice was constitutional under the Establishment Clause, but the Seventh Circuit reversed after rehearing en banc.<sup>106</sup> The initial panel decision suggested that if individuals proselytize (verbal) or distribute literature (textual), the outcome would

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<sup>101</sup> *Trunk I*, 568 F. Supp. 2d at 1224.

<sup>102</sup> *Id.*

<sup>103</sup> Churches have been used as venues for a variety of secular purposes. Examples include the use of church property as public school classrooms, *see, e.g.*, *Porta v. Klagholz*, 19 F. Supp. 2d 290, 292–93 (D.N.J. 1998); *Spacco v. Bridgewater Sch. Dept.*, 722 F. Supp. 834, 834 (D. Mass. 1989); *Thomas v. Schmidt*, 397 F. Supp. 203, 205 (D.R.I. 1975); *State of Neb. ex rel. Sch. Dist. of Hartington v. Neb. State Bd. of Educ.*, 195 N.W.2d 161, 162 (Neb. 1972); or other school events, *see, e.g.*, *ACLU-TN v. Sumner Cnty. Bd. of Educ.*, No. 03-11-0408, 2011 WL 1675008, at \*1–2 (M.D. Tenn. May 3, 2011); the use of churches as polling places, *see, e.g.*, *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 739 (10th Cir. 1992); *Berman v. Bd. of Elections*, 420 F.2d 684, 684 (2d Cir. 1969) (*per curiam*); and the use of a church as a post office, *see Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 484 (2d Cir. 2009).

<sup>104</sup> *See Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172, 175 (D. Conn. 2010) (finding a public school graduation at a Christian church to be impermissible); *Lemke v. Black*, 376 F. Supp. 87, 88 (E.D. Wis. 1974) (finding a public school graduation at a Roman Catholic church to be impermissible). *But see Musgrove v. Sch. Bd. of Brevard Cnty.*, 608 F. Supp. 2d 1303, 1305–06 (M.D. Fla. 2005) (finding a likelihood of success on the merits with respect to Establishment Clause challenge to graduation at a church “display[ing] a giant cross” but ultimately denying a preliminary injunction based on public interest considerations).

<sup>105</sup> *See Elmbrook II*, 687 F.3d at 842; *Elmbrook I*, 658 F.3d at 712–13.

<sup>106</sup> *Elmbrook II*, 687 F.3d at 843.

likely be different than if they were exposed to imagery.<sup>107</sup> And, indeed, this was exactly what the en banc majority focused on.<sup>108</sup>

The panel stated that “graduates are not forced—even subtly—to participate in any religious exercise ‘or other sign of religious devotion,’ or in any other way to subscribe to a particular religion or even to religion in general.”<sup>109</sup> It thus applied a theory of coercion to evaluate the religious imagery’s effect. Further, the panel stated that graduation attendees

are not forced to take religious pamphlets, to sit through attempts at proselytization directed by the state or to affirm or appear to affirm their belief in any of the principles adhered to by the Church or its members. Instead, the encounter with religion here is purely passive and incidental to attendance at an entirely secular ceremony.<sup>110</sup>

Characterizing the encounter as passive results from the absence of coercion to participate in religious activity; “passive” denotes noncoercion. But in *Lee*, the graduation prayer case used in the introductory example, the Supreme Court found coercion where no active participation in the prayer was required.<sup>111</sup> Thus, the only distinction plausibly left for the Seventh Circuit en banc review was the textual (prayer) in *Lee* as opposed to the visual (Latin cross) in *Elmbrook*.

In reviewing the *Elmbrook* case en banc, the Seventh Circuit concluded that having the graduation ceremony in a church violated the Establishment Clause.<sup>112</sup> Unlike the panel, the en banc majority applied a standard that did not focus solely on coerced activity, but rather combined coercion and endorsement.<sup>113</sup> In doing so, the majority focused on the textual elements—the religious literature and banners with religious messages—present in the church.<sup>114</sup> Though the majority did discuss the cross “[l]iterally and figuratively towering over the graduation proceedings,” it pointed out that “Elmbrook Church’s sizeable cross was not the only vehicle for conveying religious mes-

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<sup>107</sup> *Elmbrook I*, 658 F.3d at 733 & n.21.

<sup>108</sup> *Elmbrook II*, 687 F.3d at 843–44.

<sup>109</sup> *Elmbrook I*, 658 F.3d at 727.

<sup>110</sup> *Id.*

<sup>111</sup> *Lee*, 505 U.S. at 592–93.

<sup>112</sup> *Elmbrook II*, 687 F.3d at 843.

<sup>113</sup> *Id.* at 855 (“Although *Lee* and *Santa Fe* focus on the problem of coerced religious activity, it is a mistake to view the coercion at issue in those cases as divorced from the problem of government endorsement of religion in the classroom generally.”).

<sup>114</sup> *Id.* at 850 (holding that a public school graduation ceremony in a church violated the Establishment Clause because the church “among other things featured staffed information booths laden with religious literature and banners with appeals for children to join ‘school ministries’” (emphasis added)).

sages to graduation attendees.”<sup>115</sup> Returning to the textual, the court stressed the presence of religious pamphlets, literature, and banners in the church.<sup>116</sup> Pointing to “the sheer religiosity of the space,” the majority invoked both “the presence of religious iconography and literature.”<sup>117</sup> But the court’s emphasis seemed to be heavily on the textual elements.

While the majority did not use the active/passive distinction to describe either the display or the observers, Judge Ripple—in a dissent joined by then-Chief Judge Easterbrook and Judge Posner—used it to describe both.<sup>118</sup> Judge Ripple’s dissent discussed the majority’s application of *Lee* as well as the Supreme Court’s decision in *Santa Fe Independent School District v. Doe*—which held unconstitutional the practice of student-led prayer at football games.<sup>119</sup> The dissent argued that the prayers in *Lee* and *Santa Fe* “amounted to state sponsorship of religious activity and coerced the attending students to participate, at least passively, in that religious prayer activity. There, the state had affirmatively sponsored, endorsed and coerced participation in a specific religious activity.”<sup>120</sup>

The dissent distinguished the “religious activity” of prayer from “the mere presence of religious iconography and similar furnishings.”<sup>121</sup> The active/passive distinction in this instance is applied both to the prayer (“activity”) and symbols (“mere presence”) as well as the audience (“participate, at least passively”).<sup>122</sup> This obscures which active/passive distinctions matter and how they matter. The dissent argued that “it certainly cannot be maintained that, like in *Lee* and in *Santa Fe*, they were coerced into participating, actively or passively, in any religious ceremony or activity.”<sup>123</sup> But despite this finding of noncoercion, the role of the “passive” label here, too, is inconsistent at best.

### 3. Religious Imagery in Official Expressions of Identity

Religious text,<sup>124</sup> religious symbols,<sup>125</sup> or a combination of both<sup>126</sup> are frequently used in expressions of federal, state, or municipal identity. For in-

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<sup>115</sup> *Id.* at 852.

<sup>116</sup> *Id.* at 852–53.

<sup>117</sup> *Id.* at 853.

<sup>118</sup> *Id.* at 861 (Ripple, J., dissenting).

<sup>119</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *Elmbrook II*, 687 F.3d at 863 (Ripple, J., dissenting).

<sup>120</sup> *Elmbrook II*, 687 F.3d at 862 (Ripple, J., dissenting).

<sup>121</sup> *Id.* at 863.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 864.

<sup>124</sup> See, e.g., *Saladin v. City of Milledgeville*, 812 F.2d 687, 689 (11th Cir. 1987) (word “Christianity” in city seal).

<sup>125</sup> See, e.g., *King v. Richmond Cnty., Ga.*, 331 F.3d 1271, 1274 (11th Cir. 2003) (outline of stone tablets representing Ten Commandments in superior court clerk’s seal); *Robinson v. City of Edmond*,

stance, the national motto “In God We Trust,” the Court’s opening call including the phrase “God save the United States and this Honorable Court,” and the reference to God in the Pledge of Allegiance are textual; so is the practice of legislative prayer. Yet none of these textual expressions have been considered to violate the Establishment Clause.<sup>127</sup> While the religious content of the textual expressions has not been called into question—and they are not “passive”—they are thought not to violate the Establishment Clause mostly on the theory that these statements no longer have “force as an endorsement of belief in God.”<sup>128</sup> The practice of legislative prayer is constitutional under the Establishment Clause on account of its historical permissibility since the first Congress.<sup>129</sup> Visual symbolic representations in expressions of identity might be thought of in a similar way—either lacking religious valence or embodying historical representations—though in some of these cases, too, the textual/visual distinction suggests that courts tend to ascribe a stronger communicative force to text.

To illustrate, consider *King v. Richmond County, Georgia*, where the U.S. Court of Appeals for the Eleventh Circuit held constitutional a superior court clerk’s use of a seal featuring an outline of the Ten Commandments.<sup>130</sup> The image was “a depiction of a hilt and tip of a sword, the center of which is overlaid by two rectangular tablets with rounded tops.”<sup>131</sup> Rather than portraying the text of the Ten Commandments, “Roman numerals I through V are listed vertically on the left tablet; the right lists numerals VI to X.”<sup>132</sup> The district court found no Establishment Clause violation, instead finding “that a depiction without the text would not lead a reasonable observer to conclude that re-

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68 F.3d 1226, 1228 (10th Cir. 1995) (Latin cross in city seal); *Murray v. City of Austin, Tex.*, 947 F.2d 147, 149 (5th Cir. 1991) (cross in city seal); *Harris v. City of Zion*, 927 F.2d 1401, 1403–04 (7th Cir. 1991) (Latin cross as well as Latin cross, shield, sword, scepter, dove and crown, respectively, in city seals); *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1182, 1185 (D.N.M. 2006) (three crosses in seal on school district’s maintenance vehicles); *Webb v. City of Republic*, 55 F. Supp. 2d 994, 995 (W.D. Mo. 1999) (fish symbol in city seal); *ACLU of Ohio v. City of Stow*, 29 F. Supp. 2d 845, 847 (N.D. Ohio 1998) (cross in city seal).

<sup>126</sup> See, e.g., *Johnson v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 528 F. Supp. 919, 920 (D.N.M. 1981) (cross and motto), *rev’d sub nom. Friedman v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 781 F.2d 777 (10th Cir. 1985).

<sup>127</sup> See generally B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2010) (detailing the constitutional challenges to each).

<sup>128</sup> See *id.* at 710.

<sup>129</sup> *Greece*, No. 12-696, slip op. at 1 (upholding prayer in town board meetings); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (upholding prayer in state legislature); see also *supra* note 34 and accompanying text; *infra* notes 357–364 and accompanying text (discussing legislative prayer).

<sup>130</sup> *King*, 331 F.3d at 1273.

<sup>131</sup> *Id.* at 1274 (“Appellees conceded that the pictograph in the center of the Seal resembles depictions of the Ten Commandments.”).

<sup>132</sup> *Id.*

ligion was endorsed.”<sup>133</sup> Although the court did not use the active/passive distinction, it did find the distinction between a textual and a nontextual representation relevant. The Eleventh Circuit likewise placed great weight on the absence of the text from the symbolic representation.<sup>134</sup> In particular, the court concluded that “[b]ecause the words ‘Lord thy God’ and the purely religious mandates (commandments one through four) do not appear on the Seal, a reasonable observer is less likely to focus on the religious aspects of the Ten Commandments.”<sup>135</sup> This suggests that the text, rather than the visual symbolic representation, communicates the Decalogue’s religious message.

Courts in similar cases dealing with religious iconography in municipal seals have referenced the passivity of symbols.<sup>136</sup> One district court concluded that “it would be palatably unreasonable to require the removal of the passive and benign symbols of the cross and the motto [‘con esta vencemos’] from the seal.”<sup>137</sup> While the absence of the text from the Ten Commandments illustration presumably can be understood as the absence of a religious message, it is more difficult to see the cross as devoid of religious content. Thus, “passive and benign” cannot indicate the absence of a religious message. It more likely means that the visual of the cross, like the visual of the Decalogue without text, is comparatively less capable of conveying a religious message than religious text. The communicative impact of visuals without the text, therefore, is deemed less powerful.

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Courts tend to use the “passive” designation in Establishment Clause cases involving visual religious symbols in two ways—either simultaneously or alternatively. To the extent the “passive” label functions as an empirical assertion, it is based on an erroneous understanding of how visual images communicate. This misconception is perpetuated in Establishment Clause doctrine. It allows conceiving religious visual messages as constitutionally less troublesome and provides an avenue to discard them without fully engaging with the images’ communicative power. And when the passive label is used as shorthand for a bundle of factors that go to the cultural interpretation and context of the symbol, the designation is misleading and therefore not particularly useful.

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<sup>133</sup> *Id.* at 1275 (internal quotation marks omitted).

<sup>134</sup> *Id.* at 1285–86 (noting the absence of text material).

<sup>135</sup> *Id.* at 1285.

<sup>136</sup> See, e.g., *Johnson*, 528 F. Supp. at 925; see also *Murray*, 947 F.2d at 154–55 (discussing the noncoercive passivity of a cross in the city seal, which served primarily to identify city activity and property and to promote Austin’s “unique role and history”); *Id.* at 169 (Goldberg, J., dissenting) (“The cross is not a ‘passive’ symbol . . .”).

<sup>137</sup> *Johnson*, 528 F. Supp. at 925.

## II. HOW IMAGES COMMUNICATE

To rectify misconceptions and remedy the misguided approach to visual religious symbols illustrated in Part I, Establishment Clause theory must better account for the way in which visual images communicate.<sup>138</sup> By failing to carefully consider the way in which visual images communicate, we are missing important empirical information that is relevant for assessing the communicative impact of symbolic messages. Section A of this Part will therefore introduce empirical evidence to refute the text/image hierarchy based on visual perception.<sup>139</sup> Cognitive neuroscience research shows that images are by no means less able to communicate messages than text. Indeed, visual representations in some instances may have a greater impact on the audience than spoken or written words. Visual representations of religious symbols can be just as active as—if not, in fact, sometimes more active than—written or spoken textual religious messages. They are, eponymously, “active symbols.”

Courts, as demonstrated, make little effort to account for the visual nature of religious symbols or, worse yet, dismiss such symbols as merely “passive.”<sup>140</sup> The focus on the textual has prevented the full appreciation of the visual nature of religious symbols as images. Giving short shrift to the visual happens in other contexts as well; copyright law is but one example.<sup>141</sup> Tracing the courts’ aversion to images, one commentator even detected “in the history of the development of English law a conscious wall built against images, es-

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<sup>138</sup> This Article uses the term “image” to describe a two- or three-dimensional visual representation that exists as a physical thing in the real world (i.e., not merely cognitive, mental images that exist only in our heads). Cf. FEIGENSON & SPIESEL, *supra* note 7, at 5 (“In common usage, a ‘visual image’ can refer to an artifact, such as the snapshot you hold in your hand and look at; to your mental image of that photo; or to your visual memories drawn from your experience of looking at the photo or the thing that the photo depicts.”); Christina Spiesel, *More Than a Thousand Words in Response to Rebecca Tushnet*, 125 HARV. L. REV. F. 40, 40 n.2 (2012), <http://harvardlawreview.org/2012/02/more-than-a-thousand-words-in-response-to-rebecca-tushnet/>, archived at <http://perma.cc/5UFV-FAS8> (expressing preference for the term “picture” over “image”). Of course, these designations are arbitrary; others use different definitions. See, e.g., FEIGENSON & SPIESEL, *supra* note 7, at 5 (noting that “we will use ‘pictures’ to mean visually perceived artifacts, external visual representations, reserving ‘image’ for mental imagery (that is, internal, immaterial visual representations)”). Another scholar categorizes pictures as “all representations, including written or printed words.” *Id.* (referring to Richard Benson, former dean of the Yale School of Art). In the First Amendment context, Timothy Zick distinguishes between “oral symbols (words) and nonverbal symbolic gestures.” Zick, *supra* note 12, at 2390. Frederick Schauer distinguishes linguistic and nonlinguistic communicative acts. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 200. In the context of religious symbols, Kent Greenawalt distinguishes “signs with religious words” and “religious symbols.” 2 GREENAWALT, *supra* note 32, at 69. Likewise, my primary distinction is between textual and nontextual.

<sup>139</sup> See *infra* notes 151–187 and accompanying text.

<sup>140</sup> See *supra* notes 60–137 and accompanying text.

<sup>141</sup> See Tushnet, *supra* note 7, at 688.

entially shutting itself off from pictures.”<sup>142</sup> Perhaps indicative of this lack of appreciation of the symbolic is Justice Robert Jackson’s observation that “[s]ymbolism is a primitive but effective way of communicating ideas.”<sup>143</sup> By contrast, verbal expression is considered less primitive.<sup>144</sup> In other words, texts enjoy privileged status in the law.<sup>145</sup> One scholar observes that “[t]he preference for text over image” in the First Amendment context “is often assumed and rarely explained.”<sup>146</sup> The courts are not alone; “there is a strong cultural bias that thinking is accomplished only with words because language is the medium of thought.”<sup>147</sup> Yet, in other First Amendment contexts, as Section B of this Part illustrates, “[v]isual images are frequently perceived as more powerful and less controllable than verbal speech.”<sup>148</sup> This characterization is clearly at odds with the notion of “passive” religious symbols.

Moreover, as Section C of this Part argues in further detail, we must distinguish between visual perception of the message and the meaning of the symbolic content of the message irrespective of the medium.<sup>149</sup> How images communicate is an objective empirical question. The answer can be provided by cognitive neuroscience. The way communication via images is processed is the same for all human brains. By contrast, the question of what images—and in particular, religious symbols—mean is context-dependent and subjective. The empirical data on visual perception thus is of only limited use in constructing a more responsive conceptual framework.<sup>150</sup>

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<sup>142</sup> Spiesel, *supra* note 23, at 403; *see also* Zick, *supra* note 12, at 2398 (asserting that judges display “a general disrespect for symbolism”).

<sup>143</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

<sup>144</sup> *See* Zick, *supra* note 12, at 2273.

<sup>145</sup> *See* FEIGENSON & SPIESEL, *supra* note 7, at 4 (contending that law identifies rationality and virtue with texts rather than pictures); Spiesel, *supra* note 23, at 404 (discussing how law has depended on written texts for its development); Zick, *supra* note 12, at 2300 n.205 (arguing that the First Amendment protects verbal speech more than nonverbal gestures).

<sup>146</sup> Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 210 (2000).

<sup>147</sup> *See* Spiesel, *supra* note 23, at 392.

<sup>148</sup> *See* Adler, *supra* note 146, at 217; *infra* notes 188–238 and accompanying text. Concerns about the power of images pervade other areas of the law as well. *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 403–04 (2008) (discussing the admissibility of fetal images in tort and criminal law); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* 186 (4th ed. 2012) (discussing the court’s “authority under Federal Rules of Evidence 403 and 611(a) to minimize the emotional impact” of photographic evidence); Neal Feigenson, *Visual Evidence*, 17 PSYCHONOMIC BULL. & REV. 149, 149–53 (2010) (providing an overview of studies of visual evidence on legal decision making).

<sup>149</sup> *See infra* notes 239–299 and accompanying text.

<sup>150</sup> *See infra* 300–364 and accompanying text (providing a new conceptual framework for Establishment Clause inquiries).



### A. The Neuroscience of Visual Perception

The human brain, as a generalizable matter, processes images and words each in a particular way. Empirical evidence of brain functioning comes from two different kinds of studies. First, on the input side, functional magnetic resonance imaging (“fMRI”) can measure the difference in blood oxygen level dependent (“BOLD”) signals at resting and stimulus conditions.<sup>151</sup> Second, on the output side, responses to stimuli offered in several modes can be measured using a variety of ways that do not necessitate fMRI examination. For example, in traditional psychological research, the likelihood of remembering negative versus neutral textual information can be tested using questionnaires,<sup>152</sup> and the processing of picture-word stimuli can be examined in a similar manner.<sup>153</sup>

At this point, three preliminary observations are in order. First, an important caveat: law and science differ considerably in their methodology and interpretation of materials.<sup>154</sup> Legal scholars must therefore exercise particular caution when using neuroscience literature. Likewise, the translation of primary sources into the legal literature must be viewed with caution as the secondary literature (including the “neurolaw” literature) is likely to make more generalized statements than can be derived from experimental data as reported in scientific primary literature. This also explains in part why this Article uses neuroscience data to refute the empirical claim courts make with respect to visual perception of images, but not to fashion a new approach. Second, a word about what is *not* at issue in this discussion: the veracity of the visual representation. Much of the literature on neuroscience and the law concerns the descriptive value and “truth” of images, in particular photographs or video.<sup>155</sup> The descriptive aspect of images—whether the picture is an accurate representation of reality, as may be important in the law of evidence—is not

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<sup>151</sup> RICHARD B. BUXTON, INTRODUCTION TO FUNCTIONAL MAGNETIC RESONANCE IMAGING: PRINCIPLES AND TECHNIQUES 7 (2d ed. 2009); Arno Villringer, *Physiological Changes During Brain Activation*, in FUNCTIONAL MRI 3, 3–7 (C.T.W. Moonen & Peter A. Bandettini eds., 2000). Some of the studies discussed below employ positron emission tomography (“PET”) rather than fMRI. See generally Marcus E. Raichle & Mark A. Mintun, *Brain Work and Brain Imaging*, 29 ANN. REV. NEUROSCI. 449 (2006) (discussing the development of PET and fMRI BOLD imaging).

<sup>152</sup> See, e.g., Elizabeth A. Kensinger & Suzanne Corkin, *Memory Enhancement for Emotional Words: Are Emotional Words More Vividly Remembered Than Neutral Words?*, 31 MEMORY & COGNITION 1169, 1171 (2003).

<sup>153</sup> See, e.g., Yoav Ariei & Daniel Algom, *Processing Picture-Word Stimuli: The Contingent Nature of Picture and of Word Superiority*, 28 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 221, 222–23 (2002).

<sup>154</sup> See Goodenough & Tucker, *supra* note 18, at 65–66 (providing an overview of concerns).

<sup>155</sup> See FEIGENSON & SPIESEL, *supra* note 7, at 9–11 (discussing reality and depiction); see also Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 900–01 (2012) (using “cognitive illiberalism” to explain how people perceive “truth” to generate conclusions in line with their own values); Kahan et al., *supra* note 7, at 903–04 (same).

the subject of this discussion. Indeed, the cases discussed here do not involve the veracity of photographs at all.<sup>156</sup> Nonetheless, that body of literature is useful beyond the question of veracity. Third, with respect to the difference between photographs and other visual images—such as religious symbolic representations—it is significant to point out that many of the studies referenced in the following Subsections have employed a variety of visual stimuli, including photos and videos, but also drawings and other visual representations.

Initially, “words and pictures as perceptions both represent just dataflow coming in from outside to be understood by the brain and processed for meaning.”<sup>157</sup> The difference results from what the brain does with the sensory inputs in different areas of the brain.<sup>158</sup> Four aspects, discussed in turn, seem especially important in this context: speed of processing textual and visual information, connection to emotion, effect on memory, and persuasiveness.

## 1. Speed

First, the human brain processes visual images more quickly than words.<sup>159</sup> In fact, the speed at which the brain can process images substantially exceeds the speed at which it processes words.<sup>160</sup> There is an immediacy of reception connected with images that we do not have with words.

Some studies combine words and pictures to test the speed at which our brains process images and words. In one study involving word-picture compounds (e.g., the drawing of an apple with the word “lemon” written across it),

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<sup>156</sup> Frequently the opinions themselves do contain photographs of the religious symbols at issue. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 706 (2005) (Breyer, J., concurring); *id.* at 736 (Stevens, J., dissenting); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 622 (1989); *Trunk II*, 629 F.3d 1099, 1126–27 (9th Cir. 2011); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1125–27 (10th Cir. 2010). But veracity of the image is not questioned. See generally Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997) (discussing the dangers of incorporating photographs and other images into Supreme Court opinions because the neutrality and accuracy of the images are routinely presumed).

<sup>157</sup> Spiesel, *supra* note 23, at 393.

<sup>158</sup> See *id.*; see also Elizabeth A. Kensinger & Daniel L. Schacter, *Processing Emotional Pictures and Words: Effects of Valence and Arousal*, 6 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCI. 110, 123 (2006) (finding that words are processed in the left amygdala and pictures bilaterally).

<sup>159</sup> FEIGENSON & SPIESEL, *supra* note 7, at 9 (explaining that—due to the fact that sensory inputs are registered farthest from the frontal lobe where delayed response occurs—our brains process direct sensory inputs quicker than they process “language-mediated thoughts” involving reflection, critique, and suspicion); Christina M. Leclerc & Elizabeth A. Kensinger, *Neural Processing of Emotional Pictures and Words: A Comparison of Young and Older Adults*, 36 DEVELOPMENTAL NEUROPSYCHOL. 519, 520 (2011); Tushnet, *supra* note 7, at 691.

<sup>160</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7 (explaining that while both our eyes and brain can process visual information quicker than the conscious mind can notice, humans are able to “get the gist” of visual displays in less than a third of a second but take relatively longer to process the semantic equivalent when received verbally).

it is interesting to note that participants named the word component faster than the image.<sup>161</sup> But they categorized the pictures faster than the words.<sup>162</sup> Another study of word-picture compounds found that the evaluation of pictures was faster than that of words and the negative pictures were named faster than positive ones.<sup>163</sup>

## 2. Emotion

Second, images have a closer connection to emotion than words do.<sup>164</sup> Indeed, “pictures are especially well suited for conveying meaning through associational logic, often infused with emotions that are triggered beneath our conscious awareness.”<sup>165</sup> The appeal of images to emotion is not explicit.<sup>166</sup> Ultimately, one might argue, the source of “legal discomfort with images is the fear that they will make people feel rather than think.”<sup>167</sup>

The proximity of perception and emotion, a result of the anatomy of the human brain, makes visual images particularly powerful.<sup>168</sup> The valence-dependent responses—meaning the perception of something as positive or

<sup>161</sup> Arie'eh & Algom, *supra* note 153, at 221–22.

<sup>162</sup> *Id.*

<sup>163</sup> Jan De Houwer & Dirk Hermans, *Differences in the Affective Processing of Words and Pictures*, 8 COGNITION & EMOTION 1, 16 (1994).

<sup>164</sup> Corbin, *supra* note 7 at 26 (stating that “images . . . often have an emotional impact in ways that words do not”); Leclerc & Kensinger, *supra* note 159, at 520–21 (“[P]ictures elicit activity within emotion processing regions at earlier time points than do words. Pictures also are believed to be more salient, and to activate emotional responses more easily than words.”); Tushnet, *supra* note 7, at 691 (“[P]ictures can trigger emotions more reliably than words can.”).

<sup>165</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7–8 (“Words of course, can also prompt emotional associations, but pictures do this more rapidly.”); see also Annekathrin Schacht & Werner Sommer, *Time Course and Task Dependence of Emotion Effects in Word Processing*, 9 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCI. 28, 40 (2009) (discussing emotional content of verbal stimuli).

<sup>166</sup> Tushnet, *supra* note 7, at 696.

<sup>167</sup> *Id.* at 695. This concern is also evident in recent discussions concerning emotion and judging. See, e.g., Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1947 (2012).

<sup>168</sup> FEIGENSON & SPIESEL, *supra* note 7, at 8; Spiesel, *supra* note 23, at 393. Feigenson and Spiesel further explain:

The same areas of the brain that process visual perceptions are also responsible for mental imagery, and these are connected to the amygdala and other areas of the brain critical for emotion. And, because visual information acquires emotional valence before that information ever gets to the cortex, the whole picture passes along its emotional colors even as we begin to decode its parts. The initial emotional loading can occur nearly immediately and may influence further readings of the picture quite apart from any later contribution that cortical reflection makes.

FEIGENSON & SPIESEL, *supra* note 7, at 393; see also K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 331, 344 (2002) (reviewing 55 PET and fMRI studies investigating emotion).

negative—are more pronounced for pictures than for words.<sup>169</sup> These results show that the brain responds more intensely to pictures than words. This statement is measurable by the intensity of the activation shift, made visible by means of fMRI. Importantly, this fMRI research confirms earlier findings of traditional psychological research that pictures have a closer connection to emotion than words and are processed faster than words for emotional information.<sup>170</sup> Because “religion is an emotional subject,”<sup>171</sup> visual perception of religious symbols likewise is connected to emotion.

### 3. Memory

Third, related also to the previous point concerning emotion, is the observation that individuals remember emotional experiences more than non-emotional ones.<sup>172</sup> In fact, memory is “[t]he cognitive domain where the influence of emotion is best understood.”<sup>173</sup> Traditional psychological research with respect to textual information confirms the commonsensical notion that “[i]ndividuals are more likely to remember negative information than neutral information.”<sup>174</sup> This finding is confirmed by fMRI evidence.<sup>175</sup> With respect to pictures, fMRI re-

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<sup>169</sup> Kensinger & Schacter, *supra* note 158, at 123 (finding a shift in localization of the response from the lateral prefrontal cortex to the medial prefrontal cortex); *see also* Leclerc & Kensinger, *supra* note 159, at 519, 533 (showing this to be true for different age groups of adults). *See generally* R.J. Davidson & W. Irwin, *Functional MRI in the Study of Emotion*, in *FUNCTIONAL MRI*, *supra* note 146, at 487 (discussing data from fMRI studies to assess human emotion).

<sup>170</sup> De Houwer & Hermans, *supra* note 163, at 1 (finding support for their hypothesis “that pictures have privileged access to a semantic network containing affective information”).

<sup>171</sup> *Elmbrook II*, 697 F.3d 840, 873 (7th Cir. 2012) (Posner, J., dissenting).

<sup>172</sup> Turhan Canli et al., *Event-Related Activation of the Human Amygdala Associates with Later Memory for Emotional Experience*, 20 J. NEUROSCI. 1, 1 (2000) (discussing two PET studies and one fMRI study that “reported significant correlations between amygdala activation related to emotional stimuli and subsequent memory.”). Of the three studies mentioned, one PET study used film clips, *see* Larry Cahill et al., *Amygdala Activity at Encoding Correlated With Long-Term, Free Recall of Emotional Information*, 93 PROC. NAT’L ACAD. SCI. U.S. 8016, 8016 (1996); another PET study used pictures, *see* Stephan B. Hamann et al., *Amygdala Activity Related to Enhanced Memory for Pleasant and Aversive Stimuli*, 2 NATURE NEUROSCI 289, 289 (1999); and the fMRI study also used pictures, *see* Turhan Canli et al., *fMRI Identifies a Network of Structures Correlated with Retention of Positive and Negative Emotional Memory*, 27 PSYCHOBIOLOGY 441, 441 (1999).

<sup>173</sup> R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCI. 1191, 1192 (2002).

<sup>174</sup> Kensinger & Corkin, *supra* note 152, at 1169; *see also* Elizabeth A. Kensinger & Suzanne Corkin, *Effect of Negative Emotional Content on Working Memory and Long-Term Memory*, 3 EMOTION 378, 378 (2003) (finding that negative information is better remembered than neutral information).

<sup>175</sup> Matthias H. Tabert et al., *Differential Amygdala Activation During Emotional Decision and Recognition Memory Tasks Using Unpleasant Words: An fMRI Study*, 39 NEUROPSYCHOLOGIA 556, 556 (2001).

search found that positive and negative images are more easily remembered than neutral ones.<sup>176</sup>

Irrespective of emotional content, importantly, pictures are more likely to be remembered than words.<sup>177</sup> This is known as the “picture superiority effect”<sup>178</sup> for which the literature offers different theoretical accounts.<sup>179</sup> In sum, if emotionally charged content is easier to remember than neutral content, and pictures are easier to remember than words, it logically follows that emotionally charged pictures are particularly easy to remember. If it is true that religious content of religious visual symbols qualifies as emotionally charged, the insight that emotionally charged visual information is easier to remember appears particularly salient. In particular, nonadherents or nonbelievers might have negative emotions associated with certain religious symbols.<sup>180</sup>

#### 4. Persuasiveness

Finally, images “persuade without overt appeals to rhetoric”; this relates to the perception of text as rational and/or factual and images as irrational and/or nonfactual.<sup>181</sup> One reason for the law’s bias in favor of text may be the association of the textual with “rationality” and “objectivity” and the association of the visual with “irrationality” and “subjectivity.”<sup>182</sup> The connection between text and rationality and images and irrationality accounts for a threat associated with the visual: “Images seem especially dangerous because their power is irrational.”<sup>183</sup> The neuroscience evidence bears out the distinction between text as rational and images as irrational to some extent. Though the data of a text or a visual image is received in the same way, the image’s message is processed differently in the brain than a textual message. As compared with words, “for pictures, the effect of emotion might be in evidence immedi-

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<sup>176</sup> Florin Dolcos et al., *Dissociable Effects of Arousal and Valence on Prefrontal Activity Indexing Emotional Evaluation and Subsequent Memory: An Event-Related fMRI Study*, 23 *NEUROIMAGE* 64 (2004); see also Cahill et al., *supra* note 172, at 8016 (relying on a PET study to find this to be true for film clips).

<sup>177</sup> Miriam Z. Mintzer & Joan Gay Snodgrass, *The Picture Superiority Effect: Support for the Distinctiveness Model*, 112 *AM. J. PSYCHOL.* 113, 113 (1999); Tushnet, *supra* note 7, at 691 (stating that pictures “are easier to remember than (roughly equivalent denotational) words”).

<sup>178</sup> Mintzer & Snodgrass, *supra* note 172, at 113 (“The picture superiority effect is the highly consistent empirical finding that stimuli presented for study in picture form are more likely to be recalled on a subsequent free recall test and to be discriminated from nonstudied stimuli on a subsequent recognition memory test than stimuli presented in word form.” (citations omitted)).

<sup>179</sup> *Id.* at 113–17.

<sup>180</sup> See *infra* note 253 and accompanying text (discussing how nonadherents or nonbelievers may perceive religious symbols differently).

<sup>181</sup> Tushnet, *supra* note 7, at 692.

<sup>182</sup> See *id.* at 693–94.

<sup>183</sup> Adler, *supra* note 146, at 213 (“[B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.”); see Tushnet, *supra* note 7, at 694.

ately and might be evoked relatively automatically, whereas activation of emotional responses for word stimuli may require more in depth and controlled processing.”<sup>184</sup> Indeed, this is likely to disprove “the First Amendment truism that those who do not like a visual sign can avoid it ‘simply by averting their eyes.’”<sup>185</sup> If the perception of a visual symbol occurs all at once,<sup>186</sup> it cannot be retroactively averted. Yet, this was one of the arguments that Justice Kennedy made in the *County of Allegheny* crèche case.<sup>187</sup>

### B. Judging the Visual and Textual

Despite this empirical data on visual perception, judges largely rely on intuition when it comes to evaluating images.<sup>188</sup> In the *Elmbrook* graduation-at-church case, Judge Posner in dissent lamented the lack of constitutional or social science guidance for evaluating visuals.<sup>189</sup> Judge Posner noted that the absence of either causes “judges [to] inevitably fall back on their priors, that is, on beliefs based on personality, upbringing, conviction, experience, emotions, and so forth that people bring to a question they can’t answer by the methods of logic and science or some other objective method.”<sup>190</sup> Thus, as an initial step to allay these concerns, courts should take empirical neuroscience data into account. When approaching cases involving visual symbolic representations, courts cannot dismiss visuals; instead, they must fully engage with their power.

Since “pictures, like words, can make meanings symbolically,”<sup>191</sup> considering First Amendment speech cases proves instructive. In past speech cases, the Supreme Court has displayed a considerably more nuanced approach to visual symbolic communication than in cases involving visual religious symbols.<sup>192</sup> This suggests that concerns regarding the institutional competence of courts to properly account for the role of the visual are negligible once the prevailing resistance to dealing with visual matters is overcome.<sup>193</sup> Judges, a critic’s argument might go, are good at dealing with words, but not necessarily

<sup>184</sup> Leclerc & Kensinger, *supra* note 159, at 521.

<sup>185</sup> Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1770 (1996) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>186</sup> *Id.* (“There is an ‘all-at-onceness’ to the perception of the symbol that gives it a stronger presence . . .”).

<sup>187</sup> See *supra* note 75 and accompanying text.

<sup>188</sup> See *infra* notes 189–238 and accompanying text.

<sup>189</sup> *Elmbrook II*, 687 F.3d at 873 (Posner, J., dissenting).

<sup>190</sup> *Id.*

<sup>191</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7.

<sup>192</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (plurality opinion) (cross burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O’Brien*, 391 U.S. 367 (1968) (draft card burning).

<sup>193</sup> See Zick, *supra* note 12, at 2340.

with images. But despite the interpretive difficulties attached to symbols, recovering the symbolic meaning of a message is not beyond the judiciary's capabilities.<sup>194</sup> For instance, citing the Supreme Court cross burning case, *Virginia v. Black*, "as an exception to the general doctrines of interpretive indifference and avoidance," Timothy Zick asserts that the case "holds out the possibility that symbolic meaning can be recovered judicially" and calls the decision a "methodological success."<sup>195</sup>

The First Amendment speech cases provide sufficient evidence that judges are in fact capable of assessing the communicative impact of images.<sup>196</sup> In speech cases involving symbolic expression, such as draft card burning,<sup>197</sup> flag burning<sup>198</sup> or cross burning,<sup>199</sup> the Supreme Court routinely had to consider the "communicative impact"<sup>200</sup> of visual representations. In these cases, the Court decided that expressive conduct is sufficiently analogous to "actual speech" to warrant First Amendment protection.<sup>201</sup> As this Article argues in Part III, focusing the inquiry on communicative impact better accounts for the underlying normative concerns of the Establishment Clause and, as a side effect, contributes to greater First Amendment symmetry as well.<sup>202</sup>

In speech cases, the Court does not explicitly discuss the distinction between the textual and the visual beyond the observation that symbolic speech is speech for First Amendment purposes.<sup>203</sup> But the Court's discussion nonetheless appears relatively more attentive to the observations regarding the nature of visual communication than in the Establishment Clause context. In *Black*, for example, Justice O'Connor observed that "[i]ndividuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner."<sup>204</sup> It is to a great extent the vis-

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<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 2340, 2347 (citing *Black*, 538 U.S. at 343).

<sup>196</sup> See, e.g., *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406; *O'Brien*, 391 U.S. at 382.

<sup>197</sup> *O'Brien*, 391 U.S. at 367.

<sup>198</sup> *Johnson*, 491 U.S. at 397.

<sup>199</sup> *Black*, 538 U.S. at 347; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

<sup>200</sup> See, e.g., *United States v. Eichman*, 496 U.S. 310, 317–18 (1990) (communicative impact of flag burning); *Johnson*, 491 U.S. at 412 (same); *O'Brien*, 391 U.S. at 382 (noncommunicative impact of draft card burning).

<sup>201</sup> See, e.g., *Black*, 538 U.S. at 358 ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."); see also *Johnson*, 491 U.S. at 404 ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."). But see Adler, *supra* note 30, at 210 (arguing that the First Amendment provides more protection for verbal speech rather than visual).

<sup>202</sup> See *infra* notes 300–364 and accompanying text.

<sup>203</sup> See *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406; *O'Brien*, 391 U.S. at 382.

<sup>204</sup> *Black*, 538 U.S. at 360.

ual element of the “symbolic expression” that makes this form of communication so “effective and dramatic.”<sup>205</sup>

Scholars, accordingly, have carefully examined the burning cross as a visual representation.<sup>206</sup> The burning cross “communicates at a sensual, non- or pre-rational level, appealing to emotion and noncognitive understanding or interpretation.”<sup>207</sup> This indicates that there is a difference between the visual and the textual; the former is “less susceptible to the cooling impact of cognitive expression and reason.”<sup>208</sup> In other words, although reading about a burning cross allows us to reflect rationally, witnessing a burning cross incites an automatic, irrational response.<sup>209</sup> Likewise, it is the image of the burning flag that causes “serious offense.”<sup>210</sup> And it is the effect of that image on the observer that makes it different—contra Chief Justice Rehnquist—from someone “mak[ing] any verbal denunciation of the flag.”<sup>211</sup>

Notably, neither the cross in the cross burning cases nor the flag in the flag burning cases were designated as “passive,” even though there is little that distinguishes those symbols from religious symbols deemed “passive.”<sup>212</sup> Indeed, “symbols of State often convey political ideas just as religious symbols come to convey theological ones.”<sup>213</sup> And before they are symbols, they are visual images.<sup>214</sup> In the flag cases, like in the cross burning cases just discussed, “the power of the symbol itself operates at a nonrational level.”<sup>215</sup>

To be sure, there are profound differences between these cases involving flag burning and cross burning and those involving religious imagery.<sup>216</sup> There are two layers of symbolism: the meaning of the symbol itself, and the symbolic meaning of the act of burning the symbol. The cross was not just sitting there—it was burning. Aside from the obvious differences in substantive content, the message of destruction carries a specific connotation in the flag and

<sup>205</sup> *Id.* at 361.

<sup>206</sup> See, e.g., RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* 218 (2009).

<sup>207</sup> See *id.* at 239; see also *Black*, 538 U.S. at 400 (Thomas, J., dissenting) (“That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as ‘unwanted communication,’ but rather, as a physical threat, is of no concern to the plurality.” (citations omitted)).

<sup>208</sup> BEZANSON, *supra* note 206, at 252 (noting that “it is an entirely different experience to read about a burning cross than to witness it firsthand or see its image on film or canvas”).

<sup>209</sup> See *id.*; Tushnet, *supra* note 7, at 691.

<sup>210</sup> *Johnson*, 491 U.S. at 411.

<sup>211</sup> *Id.* at 431 (Rehnquist, C.J., dissenting).

<sup>212</sup> See, e.g., *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 397.

<sup>213</sup> See *Barnette*, 319 U.S. at 632.

<sup>214</sup> See Adler, *supra* note 146, at 214 (“[T]he flag’s message is . . . conveyed solely through its visual image. It is a wordless pattern of stars, stripes, and colors.”).

<sup>215</sup> Kent Greenawalt, *O’er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 944 (1990); see *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406.

<sup>216</sup> See *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406.



cross burning cases. But the manner in which visual perception operates is the same. And while visual representations in the Establishment Clause context have been deemed “passive,” the Court seems to be aware of their “activity” in the free speech context.

Beyond the symbolic speech context, the most instructive examples of grappling with the textual and the visual are the opinions of Justices Samuel Alito and Stephen Breyer in *Brown v. Entertainment Merchants Ass’n*—the case involving violent video games.<sup>217</sup> Justice Alito closely examined the interactivity associated with video games; he seemed troubled by the majority’s equation of the textual and the visual experience.<sup>218</sup> Whereas Justice Scalia contended for the majority—citing Judge Posner—that “all literature is interactive,”<sup>219</sup> Justice Alito, joined in concurrence by Chief Justice John Roberts, suggested that “the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before.”<sup>220</sup> The degree of interactivity Justice Alito attributed to video games does not correspond exactly to the breakdown of the textual and the visual; in his assessment, there is a quality of active engagement in playing video games that exceeds exposure to images in movies or on television.<sup>221</sup> But, however the lines may be drawn, the immediacy of video games depends in large part on the visual stimuli provided to the player.<sup>222</sup> As compared to literature, thus, “video games are far more concretely interactive”; in addition to sound and touch elements, the visual element contributes significantly to the more vivid experience.<sup>223</sup>

Justice Breyer focused on the harm that extremely violent video games can cause in children; in doing so, he used the active/passive distinction.<sup>224</sup> Video games, in Justice Breyer’s view, “can cause more harm . . . than can typically passive media, such as books or films or television programs.”<sup>225</sup> As in

<sup>217</sup> See 131 S. Ct. 2729, 2742–51 (2011) (Alito, J., concurring in the judgment); *id.* at 2761–71 (Breyer, J., dissenting).

<sup>218</sup> *Id.* at 2750–51 (Alito, J., concurring in the judgment) (disagreeing with the majority’s assessment that literature was as interactive as the violent video games at issue).

<sup>219</sup> *Id.* at 2738 (“As Judge Posner has observed, all literature is interactive . . . ‘Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.’” (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001))); see also Tushnet, *supra* note 7, at 745–47 (discussing Judge Posner’s assessment of the textual and visual in other cases).

<sup>220</sup> *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2748 (Alito, J., concurring in the judgment).

<sup>221</sup> See *id.* at 2742. But see Tushnet, *supra* note 7, at 698 (suggesting that the lines may be drawn differently).

<sup>222</sup> *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2748 (Alito, J., concurring in the judgment) (discussing the high quality and realistic appearance of images).

<sup>223</sup> *Id.* at 2750 (citations omitted) (internal quotation marks omitted).

<sup>224</sup> *Id.* at 2768 (Breyer, J., dissenting).

<sup>225</sup> *Id.*

Justice Alito's concurrence, Justice Breyer's alignment of active (video games) and passive (books, films, and television) does not correspond to the visual versus textual breakdown.<sup>226</sup> Moreover, the "passive" label shifts between describing the medium itself and the viewer.<sup>227</sup> Though less pronounced than in Justice Alito's concurrence, the visual component in Justice Breyer's dissent likely plays a significant role as well.<sup>228</sup> Whether these opinions signal a new trend in Supreme Court opinions assessing visual experience on observers is unclear. But it seems worth noting that at least three justices seem aware of the potential importance of evaluating the power of visual images.

In another context, two recent decisions concerning graphic warnings on cigarette packages illustrate how the distinction between the rational or factual associated with text and the irrational or nonfactual associated with images plays out. In one decision, the U.S. Court of Appeals for the Sixth Circuit held constitutional the U.S. Food and Drug Administration's (FDA) graphic warning requirements.<sup>229</sup> In doing so, the court considered the visual images to be subjective and acknowledged the "inherently persuasive character" of visual images.<sup>230</sup> The dissent, moreover, elaborated on the emotional aspect of the images.<sup>231</sup> In another decision, the U.S. Court of Appeals for the D.C. Circuit vacated the FDA's graphic warning requirements on cigarette packages.<sup>232</sup> In doing so, the D.C. Circuit addressed the distinction between textual warnings and visual graphic warnings.<sup>233</sup> The panel majority and the dissent disagreed on whether the emotive nature of graphic images could render otherwise factual accompanying text nonfactual or controversial.<sup>234</sup> Notably, the dissent ar-

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<sup>226</sup> See *id.* at 2768.

<sup>227</sup> *Id.* at 2769 (using the term in both ways—at times describing interactive games as more "passive" than other media types, but also describing the "passive" viewing experience of television and films).

<sup>228</sup> See *id.* at 2767 (discussing "images of human beings as targets"); *id.* at 2771 (discussing depictions and images).

<sup>229</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526 (6th Cir. 2012).

<sup>230</sup> *Disc. Tobacco City*, 674 F.3d at 526 ("But, in contrast to the textual warnings, there can be no doubt that the FDA's choice of visual images is subjective, and that graphic, full-color images, because of the inherently persuasive character of the visual medium, cannot be presumed neutral.").

<sup>231</sup> *Id.* at 528 (Clay, J., dissenting).

<sup>232</sup> *R.J. Reynolds*, 696 F.3d at 1208.

<sup>233</sup> *Id.* at 1211.

<sup>234</sup> Compare *id.* at 1216 (stating that the graphic warnings did not constitute information that was "purely factual and uncontroversial"), with *id.* at 1230 (Rogers, J., dissenting) ("That such images are not invariably comforting to look at does not necessarily make them inaccurate."). In *Discount Tobacco City*, the Sixth Circuit said the images were factual. 674 F.3d at 569; see also Corbin, *supra* note 7, at 39 (agreeing with the Sixth Circuit's determination that the emotion-invoking images were nevertheless factual and contrasting the reasoning with that of the D.C. Circuit in *R.J. Reynolds*).

gued that the emotive nature of visual images “does not necessarily undermine the warnings’ factual accuracy.”<sup>235</sup>

In all of these examples, only Justice Breyer’s dissent in the video games case explicitly referenced neuroscience research.<sup>236</sup> Otherwise, the distinctions between textual and visual appear to be largely a product of the judges’ intuitions. That does not mean that these intuitions are necessarily wrong in light of cognitive neuroscience insights; the speech cases discussed here illustrate that they may well be correct.<sup>237</sup> But the absence of an empirical basis for these intuitive assumptions should give us pause. Indeed, as this Article argues with respect to religious symbols, such intuitive assumptions may just as well turn out to be wrong. And at least some judges seem acutely aware of this problem.<sup>238</sup>

### *C. Distinguishing Visual Perception and Cultural Meaning*

So far, the discussion of religious visual symbols as images has largely disregarded the symbolic dimension. To reiterate, how visual images communicate is an empirical, objective question whereas the question of meaning is subjective and context-dependent. The neuroscience data presented in Section A of this Part undermines the claim that visuals are somehow less powerful or even “passive” as compared to text.<sup>239</sup> This Section shows that to the extent “passive” is shorthand for a bundle of factors related to context or cultural meaning, the label is misleading at best, and therefore not useful.<sup>240</sup>

For purposes of the Establishment Clause, we are only concerned with visual representations that are *religious* symbols. Thus, problems arise especially when visual representations are not obviously religious.<sup>241</sup> Which visual symbols are religious? Semiotics teaches us that multiple steps are involved in getting from a visual image to a symbolic religious message.<sup>242</sup> Simply put, cultural meaning is given to the symbolic representation.

Images, like texts, must be interpreted to fully make their meaning accessible. Images “acquire meaning from our associations to them, drawn from our perceptual knowledge, experience, [and] cultural setting.”<sup>243</sup> This brings the

<sup>235</sup> *R.J. Reynolds*, 696 F.3d at 1230.

<sup>236</sup> See *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2768 (Breyer, J., dissenting).

<sup>237</sup> See *supra* notes 192–235 and accompanying text.

<sup>238</sup> See *Elmbrook II*, 687 F.3d at 873 (Posner, J., dissenting).

<sup>239</sup> See *supra* notes 151–187 and accompanying text.

<sup>240</sup> See *infra* notes 241–299 and accompanying text.

<sup>241</sup> 2 GREENAWALT, *supra* note 32, at 69 (“The interesting, and constitutionally troublesome, issues arise in more ambiguous situations, in which it is unclear either whether words or symbols are religious or whether the state supports the religious message that they indisputably convey.”).

<sup>242</sup> See Zick, *supra* note 12, at 2330–32 (outlining semiotics in order to appropriately interpret enigmatic signs).

<sup>243</sup> Spiesel, *supra* note 138, at 41.

communicative impact of visuals into conversation with more traditional approaches to the interpretation of texts and symbols, including literary criticism, ethnography, and other interpretive tools discussed in the legal literature.<sup>244</sup> Legal scholars have proposed various approaches to determine the symbolic meaning of a message.<sup>245</sup> For example, several scholars have suggested looking to the work of anthropologist Clifford Geertz.<sup>246</sup> Using an ethnographic approach, these scholars argue, facilitates the recovery of the cultural meaning of the symbol.<sup>247</sup> Cultural literacy in interpreting religious symbols thus becomes key; the observer must recognize the religious nature of the symbol or act. Indeed, as Justice Felix Frankfurter stated in his dissent in *West Virginia Board of Education v. Barnette*, “The significance of a symbol lies in what it represents.”<sup>248</sup>

But who decides what the symbol represents? As Rebecca Tushnet explains, “we trust our own (natural-seeming and immediate) reactions to images, but we worry that other people’s reactions to images may be irrational—especially if they don’t see the same things we do.”<sup>249</sup> But what individual observers see is determined by their characteristics; what one may deem natural and immediate may not be at all obvious to someone else looking at the same visual representation. Whether the observer views a football game of his own team<sup>250</sup> or is otherwise affiliated with one side,<sup>251</sup> the same is likely true for the religious affiliation of the observer.<sup>252</sup> If the observer is affiliated with a religious group whose symbol is on display, the perception is likely different than if the observer is not affiliated with that particular group or, even more prob-

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<sup>244</sup> See, e.g., Hill, *supra* note 10, at 493 (using a literary criticism approach); Zick, *supra* note 12, at 2265 (proposing an ethnography approach).

<sup>245</sup> See, e.g., Hill, *supra* note 127, at 770 (applying a speech act theory approach to ceremonial deism); Hill, *supra* note 10, at 493 (applying a linguistic speech act theory to interpret the meaning of religious symbols).

<sup>246</sup> See Ravitch, *supra* note 10, at 1021 (referencing Geertz’s analysis of the purpose of religious symbols in that they “function to synthesize people’s ethos”); Zick, *supra* note 12, at 2266 (stating that the Geertzian “approach . . . focuses on the interpretation of symbols and symbol systems within a culture”). See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

<sup>247</sup> See, e.g., Ravitch, *supra* note 10, at 1021; Zick, *supra* note 12, at 2322.

<sup>248</sup> 319 U.S. at 662 (Frankfurter, J., dissenting).

<sup>249</sup> Tushnet, *supra* note 7, at 721; see also Adler, *supra* note 30, at 214–15 (identifying similar issues in *Barnette*).

<sup>250</sup> See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 132–34 (1954) (analyzing selective perception among fans at a Princeton-Dartmouth football game).

<sup>251</sup> This is a key theme discussed in the literature on cognitive illiberalism. See, e.g., Kahan et al., *supra* note 7, at 838.

<sup>252</sup> See, e.g., 2 GREENAWALT, *supra* note 32, at 89 (“Most Christians may pass a crèche in a public space without giving it a second thought; it may have more significance for most Jews.”).

lematically perhaps, not affiliated with any religion.<sup>253</sup> Perception of the visual symbol, in short, arguably “depends on which team you favor.”<sup>254</sup>

Moreover, in the context of religious symbols, in *Lynch v. Donnelly*, the Supreme Court suggested that to “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”<sup>255</sup> Though questionable with respect to the conclusion on the merits, the idea is the same as the proposition that we tend to more easily find something we are looking for.<sup>256</sup> This is not to say that the merits question will be answered differently, and uniformly, according to the religious background of the viewer.<sup>257</sup> Instead, it simply means that perception is influenced by individual characteristics. Moreover, this observation highlights the importance of distinguishing between perception, interpretation of the message, and the merits question. It also illustrates one of the key problems of the endorsement test’s “reasonable observer” persona that (still) is predominantly used to assess whether public displays violate the Establishment Clause.<sup>258</sup>

Justice Jackson in *Barnette* overstated the subjectivity of symbolic speech.<sup>259</sup> Sometimes symbols, including religious symbols, are relatively clear in their

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<sup>253</sup> See generally Caroline Mala Corbin, *Nonbelievers and Government Religious Speech*, 97 IOWA L. REV. 347 (2012) (contending that government religious speech violates the Establishment Clause even if it only offends nonbelievers); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011) (arguing that courts should treat nonbelievers differently in Establishment Clause analysis).

<sup>254</sup> Tushnet, *supra* note 7, at 701. Some advocate for a larger role of the faithful. Timothy Zick has argued for a Geertzian “interpretive, semiotic approach to sacred symbols [that] must take into consideration the ‘moods and motivations’ sacred symbols can evoke in the faithful.” Zick, *supra* note 12, at 2311. In his assessment, it is the perspective of the faithful that is lacking in “the current doctrine of sacred symbols.” *Id.* Although I agree with the general proposition that symbols must be taken more seriously—and the Geertzian approach appears to be one suitable avenue—it is not primarily the perspective of the faithful that deserves attention. Rather, in Establishment Clause cases, we are chiefly concerned with the meaning a religious symbol has to others, who will be rendered outsiders if the State embraces a religious identity for itself and reinforces that choice symbolically to its citizens.

<sup>255</sup> 465 U.S. 668, 680 (1984).

<sup>256</sup> Though beyond the scope of this discussion, it is worth pointing out that there is a body of cognitive neuroscience literature dealing with the question of attention. For an example of such literature, see generally Kathleen M. O’Craven et al., *fMRI Evidence for Objects as the Units of Attentional Selection*, 401 NATURE 584 (1999).

<sup>257</sup> See Hill, *supra* note 10, at 531–32 (arguing that religious background does not determine the outcome on the merits in religious symbol cases).

<sup>258</sup> See 2 GREENAWALT, *supra* note 32, at 87 (“The test, at least in its basic outline, has considerable appeal, but its proper boundaries and status are elusive, and these bear importantly on how, in my judgment, courts should respond to texts and symbols that people may perceive differently.”); see also B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2330338>, archived at <http://perma.cc/EWB7-TGP3> (addressing criticisms of the reasonable observer).

<sup>259</sup> 319 U.S. at 632–33 (“A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn”).

meaning.<sup>260</sup> This creates a conundrum that explains why visual perception alone cannot provide an answer to Establishment Clause inquiries. Two examples, the Latin cross and holiday displays, illustrate this problem. If images are as powerful as the neuroscience data suggests, they may still differ in their degrees of sectarianism. Arguably, the Latin cross conveys a more clearly religious message than the crèche as a component of Christmas displays. Thus, Part III provides a conceptual framework rather than an empirics-based one to reconceptualize Establishment Clause inquiries.

### 1. Latin Cross

One purportedly “passive” symbol in particular has been the subject of recent litigation, both domestically and abroad: the Latin cross. In determining the religious nature of a symbolic message, “the preeminent symbol of Christianity”<sup>261</sup> is the seemingly easy case. Federal courts have consistently interpreted the Latin cross to be a religious symbol.<sup>262</sup> Yet, even the Latin cross causes interpretive difficulties. Are we dealing with a bare cross, customary in many Protestant denominations, or a crucifix depicting the corpus, common in the Catholic, Lutheran, Eastern Orthodox, and Anglican traditions? The symbolic message communicated differs accordingly, and at least one judge has suggested a distinction in meaning on this basis.<sup>263</sup> Despite general consensus that the cross is a religious symbol, there is a decided lack of agreement on the question whether it has additional secular meaning.<sup>264</sup> The “passive” label fails adequately to capture these contextual concerns.

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<sup>260</sup> See Laycock, *supra* note 47, at 1244–49 (rejecting the “assault on meaning” in cases involving textual and visual religious symbols); Zick, *supra* note 12, at 2336 (“Some symbols more or less speak for themselves; they are ‘uncontested’ in the legal sense of the term.”).

<sup>261</sup> Salazar v. Buono, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment) (referring to the cross).

<sup>262</sup> See, e.g., *Trunk II*, 629 F.3d 1099, 1101 (9th Cir. 2011); *Am. Atheists, Inc.*, 616 F.3d at 1160; *Weinbaum v. Las Cruces*, 541 F.3d 1017, 1022–23 (10th Cir. 2008); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Gonzales v. N. Twp. of Lake Cnty., Ind.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980).

<sup>263</sup> *Separation of Church & State Comm.*, 93 F.3d at 626 n.12 (O’Scannlain, J., concurring) (“While a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be.”).

<sup>264</sup> See *infra* notes 265–287 and accompanying text. Courts elsewhere have encountered similar questions whether the Latin cross has a discernible secular meaning. In 2011, in *Lautsi v. Italy*, Italy argued that outfitting public school classrooms with crucifixes communicated a fundamentally cultural, rather than religious, message. *Lautsi v. Italy*, App. No. 30814/06, at \*1, \*17 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>, archived at <http://perma.cc/7B38-PCAX>.

One nonreligious alternative meaning of the Latin cross is evident. The burning cross conveys a message of racial hatred,<sup>265</sup> one that also attaches to the Ku Klux Klan's (KKK) use of the cross when it is not set ablaze.<sup>266</sup> In *Capitol Square Review & Advisory Board v. Pinette*—a case in which the KKK sought to place an unadorned (and not burning) cross in a display on public property—Justice Clarence Thomas pointed out the nonreligious meaning of erecting such a cross, characterizing it as “a political act, not a Christian one.”<sup>267</sup> To be sure, the cross remains primarily a Christian symbol, but according to Justice Thomas, “[t]he Klan simply . . . appropriated one of the most sacred of religious symbols as a symbol of hate.”<sup>268</sup> The symbolic message communicated by the cross in this instance, therefore, is only apparent in light of the KKK's authorship.

In several more recent cases, another secular message has been ascribed to the cross. Several judicial decisions have found it to be a marker of the resting place of the dead, with various secular messages of honor, valor, and sacrifice attached.<sup>269</sup> Justice Kennedy, writing for the plurality in *Salazar v. Buono*, interpreted the cross in this manner.<sup>270</sup> Both Justice Kennedy and Justice Alito further interpreted the meaning of the cross as reminiscent of military cemeteries in the United States and abroad.<sup>271</sup> Likewise, in *American Atheists, Inc. v. Davenport*, the U.S. Court of Appeals for the Tenth Circuit—in a case involving Utah highway crosses—acknowledged that “a reasonable observer would recognize these memorial crosses as symbols of death.”<sup>272</sup> But the Tenth Circuit also pointed out that there is a distinctly Christian dimension to the use of the cross as a marker of death.<sup>273</sup> And though common as a symbol of death, it is not therefore secular.<sup>274</sup> Likewise, in *Buono*, Justice Stevens expressed the view that “[m]aking a plain, unadorned Latin cross a war memorial does not

<sup>265</sup> *Black*, 538 U.S. at 357 (noting that the burning of a cross was a “symbol of hate”).

<sup>266</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring).

<sup>267</sup> *Id.* (noting “the fact that the legal issue before us involves the Establishment Clause should not lead anyone to believe that a cross erected by the Ku Klux Klan is a purely religious symbol”).

<sup>268</sup> *Id.* at 771.

<sup>269</sup> *See, e.g., Buono*, 559 U.S. at 721 (plurality opinion); *Davenport*, 637 F.3d at 1111.

<sup>270</sup> *Buono*, 559 U.S. at 721 (plurality opinion).

<sup>271</sup> *Id.*; *id.* at 723–24 (Alito, J., concurring in part and concurring in the judgment).

<sup>272</sup> 637 F.3d at 1122.

<sup>273</sup> *Id.* As the Tenth Circuit put it, “a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.” *Id.* Further, the court found “no evidence . . . that the cross has been widely embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death.” *Id.* Similarly, an exchange during oral argument in *Buono* illustrated the difference between a generic marker and a distinctly Christian marker. Transcript of Oral Argument at 38–39, *Buono*, 559 U.S. 700 (No. 08-472).

<sup>274</sup> *Davenport*, 637 F.3d at 1122–23.

make the cross secular. It makes the war memorial sectarian.”<sup>275</sup> Therefore, even if there were a secular message grafted onto the religious message of the cross, it does not become “passive” in its meaning.

Scholars and courts disagree whether meaning is an empirical question,<sup>276</sup> but that is a different question than the empirical claim regarding visual perception. Does it matter for the assessment of the religious character of a cross memorial in Utah that the designers do not revere the cross as a religious symbol<sup>277</sup> and only eighteen percent of that state’s population does so?<sup>278</sup> The larger question is to what extent the local should matter in questions of Establishment Clause application in general, and its application to religious symbolic expression in particular.<sup>279</sup> But on the narrower question posed here, the context of determining the symbol’s meaning, it is largely irrelevant whether the cross is revered as a symbol of faith in the local community.<sup>280</sup> What matters is that it is recognizable as a religious symbol, even if it is not the object of religious reverence. Put another way, the majority of Utah citizens likely knows that the Latin cross is a religious symbol. Likewise, as cases such as *Davenport* show, the intent of the designers (and possible testimony as to intent) will not necessarily matter for the court’s interpretation of the symbol.<sup>281</sup> Courts should attempt to inquire into the range of plausible meanings, including potential religious and secular meanings of the symbols, in coming to a context-dependent conclusion.<sup>282</sup> The difficulty of this analysis will vary case-by-case.

If the Latin cross has additional meaning(s), should that matter for Establishment Clause purposes? Scholars have examined similar questions under the headings of contested and uncontested meanings,<sup>283</sup> social meaning,<sup>284</sup> as well

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<sup>275</sup> *Buono*, 559 U.S. at 747 (Stevens, J., dissenting).

<sup>276</sup> See, e.g., Hill, *supra* note 10, at 529 (asserting that lower courts treat meaning “as primarily an empirical question” and disagreeing with that approach).

<sup>277</sup> *Davenport*, 637 F.3d at 1118 (“The secular nature of the UHPA motive is bolstered by the fact that the memorials were designed by two individuals who are members of the Mormon faith, the Church of Jesus Christ of Latter Saints [sic] (‘LDS Church’), a religion that does not use the cross as a religious symbol.”).

<sup>278</sup> *Id.* 1121–22 (noting that “a majority of Utahns do not revere the cross as a symbol of their faith”). The Tenth Circuit did not find that to be the case. See *id.* at 1122–24 (“Similarly, the fact that cross-revering Christians are a minority in Utah does not mean that it is implausible that the State’s actions would be interpreted by the reasonable observer as endorsing that religion.”).

<sup>279</sup> See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1874–91 (2004).

<sup>280</sup> See Laycock, *supra* note 47, at 1243 (reaching the same conclusion).

<sup>281</sup> See *Davenport*, 637 F.3d at 1118; Hill, *supra* note 10, at 529 (discussing problems associated with treating “[t]he meaning of . . . allegedly religious symbols . . . as primarily an empirical question”). But see Zick, *supra* note 12, at 2337–38 (noting that “the speakers testified with respect to their intended messages, thus removing any remaining symbolic uncertainty”).

<sup>282</sup> Zick, *supra* note 12, at 2367.

<sup>283</sup> *Id.* at 2336.



as consensus on meaning.<sup>285</sup> As in the First Amendment speech context, there are standard and nonstandard interpretations of visual religious symbols.<sup>286</sup> The secular message of the cross in particular is far less obvious and far more contested than its religious message. As Douglas Laycock notes, the nonreligious meaning of the cross, as discussed in these cases, depends entirely on its religious meaning.<sup>287</sup> Thus, there is so little ambiguity in the message of the cross that, even if it communicates an alternative message—and especially if that alternative meaning is indeed entirely dependent on the religious message—the alternative meaning should not matter for the message of the cross. And none of these alternative meanings, even if they were plausible, are helpfully summarized under the label “passive.”

## 2. Christmas Displays

The ostensible problem of ambiguity we see in connection with the Latin cross does not arise in the same way in the Christmas display cases, because the crèche—with figures of Mary and Joseph, the baby, and the shepherds—can be identified as the visual representation of the textual Biblical story of Jesus’s birth.<sup>288</sup> This identification, of course, requires that the audience knows of the scriptural source. Perhaps more problematic, once the crèche is combined in a Christmas display with other, secular features,<sup>289</sup> selective observation may factor into the display’s assessment. We may focus on the religious or secular elements of such “mixed” holiday displays, depending on what we are looking for.<sup>290</sup> Indeed a similar problem arises when the cross is only one element of a larger display, such as the Mt. Soledad war memorial.<sup>291</sup>

But there is another complication with respect to Christmas displays: the Christmas holiday, and the crèche as its representation, may have undergone a process of secularization.<sup>292</sup> The Tenth Circuit, for instance, contrasted Christ-

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<sup>284</sup> CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 124–28 (2007).

<sup>285</sup> Hill, *supra* note 10, at 518.

<sup>286</sup> See Schauer, *supra* note 138, at 226 (discussing nonstandard meaning of nonlinguistic communication).

<sup>287</sup> Laycock, *supra* note 47, at 1240–42. Laycock concludes that “[t]here is no ambiguity about the primary meaning of a Christian cross.” *Id.* at 1239.

<sup>288</sup> See Luke 2:1–:20 (New American Bible); Matthew 2:1–:11 (New American Bible).

<sup>289</sup> See *Lynch*, 465 U.S. at 671.

<sup>290</sup> See *supra* notes 252–256 and accompanying text; cf. Tushnet, *supra* note 7, at 748 n.290 (collecting sources that discuss how people will not notice things if they are not actively looking for them).

<sup>291</sup> *Trunk II*, 629 F.3d at 1103.

<sup>292</sup> See Hill, *supra* note 127, at 715–26 (discussing secularization thesis and criticisms); see also Ravitch, *supra* note 10, at 1059–61 (discussing the distinction between desacrilization and secularization).

mas, “which has been widely embraced as a secular holiday,” with the cross, for which the court discerned “no evidence” of being “widely embraced by non-Christians as a secular symbol for death.”<sup>293</sup> Although courts often assert that certain symbols or expressions have lost their religious content, it remains unclear how exactly they make this determination.<sup>294</sup> Addressing this shortcoming, Jessie Hill suggests taking a linguistic speech act theory approach to the “methodological question whether the religiosity of a particular practice, symbol, or phrase has faded.”<sup>295</sup> In the context of advocating a Geertzian approach, Timothy Zick argues that judicial interpretation has led to desacralization of holiday displays in most instances.<sup>296</sup> But even if an “authoritative means of resolving the meaning of sacred symbols” appears out of reach, a more attentive evaluation and interpretation is necessary.<sup>297</sup> Some, however, point out that it is not the loss of religious meaning—the desacralization of the symbols themselves that is caused by adding secular elements—but rather the secularization of the overall display.<sup>298</sup> It appears less important to determine who is right; it is, however, important to note that a shift in symbolic meaning seems to occur that changes the message communicated. Nevertheless, the core meaning of the symbolic representation is unambiguously religious.<sup>299</sup> Here, too, none of the shifts in meaning are usefully described as “passive.”

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Visual symbols are at least as “active” as textual speech, an empirical finding that is objectively ascertainable by neuroscience data. The data refutes the empirical claim that visual symbols are merely “passive” as compared to text. Judges seem to be aware of the activity of symbols in the speech cases discussed. The result of the empirical question—how images communicate, in light of the neuroscience data presented—is that text and visual images should be treated the same way in terms of their communicative impact. The separate question of symbolic meaning is context-dependent and subjective. At this point, the empirical literature can be brought into conversation with the interpretive literature that concerns the meaning of symbols. The cultural interpretation of symbols also is the same for visual and textual messages; text and images can equally be used to convey symbolic messages that must be inter-

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<sup>293</sup> *Davenport*, 637 F.3d at 1122.

<sup>294</sup> Hill, *supra* note 127, at 714–26.

<sup>295</sup> *Id.* at 731.

<sup>296</sup> Zick, *supra* note 12, at 2367 (“The upshot, where some secular purpose, as is generally the case, can be ascertained or judicially imagined is that judges . . . will only in the rarest of circumstances perceive an unconstitutional establishment from the display of sacred symbols.”).

<sup>297</sup> *Id.*

<sup>298</sup> Ravitch, *supra* note 10, at 1059–61.

<sup>299</sup> See EISGRUBER & SAGER, *supra* note 284, at 134 (reaching the same conclusion).

preted in order to make their meaning accessible. Interpreting the meaning of symbols, thus, has nothing to do with whether the medium is textual or visual.

### III. COMMUNICATIVE IMPACT

What prescriptive lessons follow from these insights for the Establishment Clause and for First Amendment theory as it concerns visual symbols more broadly? Images speak at least as loudly as words, and sometimes—as the discussion in Part II suggests—a message may be conveyed even more intensely by images than by words. There should not be a constitutionally relevant distinction between images and words that discounts the communicative impact of images and privileges words. Having discarded the active/passive distinction and textual privilege, this Part provides a novel conceptual framework for assessing symbolic religious messages according to their communicative impact irrespective of the medium. It argues that endorsement and coercion should be reconceptualized as matters of degree rather than kind, because doing so provides a better account of what matters: the communicative impact of a message. This conception is more responsive to the underlying normative concern that the State may not adopt a religious identity of its own.

The most obvious immediate justification for the medium-neutral prescriptive position stems from the text of the Establishment Clause itself. Textually, the Establishment Clause is medium-neutral; “Congress shall make no law respecting an establishment of religion”<sup>300</sup> does not indicate by which communicative means an establishment results. To adapt the classic principle of media neutrality in copyright law, it is the establishment of religion that the Establishment Clause prohibits, and not the particular form by which such establishment is ultimately achieved.<sup>301</sup> If textual messages are capable of producing an Establishment Clause violation by communicating the state’s own religious identity and resulting preference for one particular religion, the same is true for visual messages. In light of the provision’s medium-neutrality, courts ought to assess textual and visual religious messages alike in terms of their communicative impact.

This Part argues that courts should examine visual religious symbols under a communicative impact framework. First, Section A explains that the proposed communicative impact framework for visual symbols would result in greater First Amendment symmetry.<sup>302</sup> Next, Section B addresses the question of when the communicative impact of religious symbols can be attributed to

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<sup>300</sup> U.S. CONST. amend. I.

<sup>301</sup> Cf. *Holmes v. Hurst*, 174 U.S. 82, 98 (1899) (“It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes . . .”).

<sup>302</sup> See *infra* notes 305–327 and accompanying text.

the State and accordingly trigger the Establishment Clause.<sup>303</sup> Finally, Section C reframes familiar themes of Establishment Clause doctrine under the premise that the State may not communicate a religious identity, regardless of whether through endorsement or coercion.<sup>304</sup>

### A. First Amendment Symmetry

Communicative impact is routinely examined in free speech doctrine and theory.<sup>305</sup> There, the question is whether a law is aimed at the communicative impact of the expression or whether it is a law of general application that has an incidental effect on the communication.<sup>306</sup> This question has relevance in the context of both textual and symbolic speech. For a symbolic speech example, recall only *Virginia v. Black*, the cross burning case.<sup>307</sup> Communicative impact in the free speech area is employed to discuss the content of the message conveyed.<sup>308</sup> Likewise, we are concerned with the question of content of the message in the Establishment Clause context. In free speech scholarship, the content of the message conveyed is often expressed in terms of the speech's communicative impact.<sup>309</sup> Importantly, scholars in the free speech context sometimes speak of communicative impact in terms suggesting a distinction of degrees.<sup>310</sup>

<sup>303</sup> See *infra* notes 328–339 and accompanying text.

<sup>304</sup> See *infra* notes 340–364 and accompanying text.

<sup>305</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning).

<sup>306</sup> See *O'Brien*, 391 U.S. at 376–77; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988) (subsequently elaborating the *O'Brien* idea of communicative impact as government motivation); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496–98 (1975) (analyzing *O'Brien's* communicative impact inquiry).

<sup>307</sup> See 538 U.S. at 360–61; cf. Schauer, *supra* note 138, at 201 (explaining that “the case turned not on whether Virginia had targeted the communicative impact of cross-burning, for of course it had, but instead on whether this was one of the communicative impacts whose delivery the First Amendment did not protect”).

<sup>308</sup> Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 244 (2012) (explaining that “content is most frequently glossed in terms such as ‘message,’ ‘substance,’ ‘meaning,’ or ‘communicative significance’”).

<sup>309</sup> *Id.* Sometimes “message” and “communicative impact” are used interchangeably. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 117 (1981) (rejecting the *O'Brien*-Hart-Tribe concept but still agreeing with this point).

<sup>310</sup> See, e.g., William E. Lee, *The Futile Search for Alternative Media in Symbolic Speech Cases*, 8 CONST. COMMENT. 451, 457 (1991) (discussing alternative mediums for speech: “another medium will be adequate even though the communicator must sacrifice some intensity or communicative impact”; “the alternatives must not result in diminished communicative impact”; and “the comparison of the communicative impact of various forms of speech”). Likewise, in the context of (usually textual expressions of) ceremonial deism, one scholar asserts that such messages, “though religious in origin . . . no longer carry any religious impact.” See Hill, *supra* note 127, at 712 (emphasis added). Further, she argues that city names “have lost their religious impact over time,” and concludes that “one might doubt whether the city names of Corpus Christi and San Francisco, or perhaps even the use of ‘A.D.’

In its focus on communicative impact, the framework proposed in this Article results in greater First Amendment symmetry. Text should no longer be given special status in the Establishment Clause context; as previously demonstrated, this distinction does not exist in the speech context.<sup>311</sup> To be sure, the underlying concerns are different.<sup>312</sup> We are not worried about preferential messages in the speech context; indeed, government speech can advance specific positions (e.g., anti-smoking or anti-obesity).<sup>313</sup> There is, moreover, no inherent value in greater First Amendment symmetry for symmetry's sake; the chief concern here is the empirical approach to visual perception. Why is the theoretical and doctrinal approach to a cross on the wall different than to a burning cross? On the level of visual perception, it should not be.<sup>314</sup>

On the question of interpretation of the cultural meaning, historical and cultural context plays a crucial role. In *Black*, the burning cross was not merely an image, it was a symbol; what makes an image a symbol is the cultural meaning we attach to it.<sup>315</sup> It was the visual character of the burning cross that was central to conveying a message that could hardly have been communicated in a textual form.<sup>316</sup> The message's specific "meaning—lynching, burning, violent racism—lay not in the image itself when viewed as a bare text."<sup>317</sup> Rather, it is the interpretation of its symbolism that gives it meaning. Thus, the "burning cross—a symbol—was understood to constitute essentially an explicit threat, allowing the state to ban cross-burning carried out for the purposes of intimidation."<sup>318</sup>

The cultural dimension of interpreting the symbol of the burning cross is well understood by the Supreme Court. Justice Thomas stated in his dissent in *Black* that "[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane. I believe that cross burning is the paradigmatic example of the latter."<sup>319</sup> In the same case, Justice O'Connor stated in her partial majority and partial plurality

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on public documents, should be unconstitutional given the apparent *lack of religious impact* those terms convey." See *id.* at 726, 759 (emphasis added).

<sup>311</sup> See *supra* notes 188–238 and accompanying text.

<sup>312</sup> See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526 (6th Cir. 2012) (permitting preferential messages in the speech context).

<sup>313</sup> See *id.*

<sup>314</sup> See *supra* notes 151–187 and accompanying text.

<sup>315</sup> See BEZANSON, *supra* note 206, at 239 (explaining that "historically grounded cultural meaning attached to the burning cross" was due in large part to the experiences by people who witness the burning cross in public, especially for those people of race who "had deeply internalized the brutal connotations").

<sup>316</sup> See Tushnet, *supra* note 7, at 697.

<sup>317</sup> BEZANSON, *supra* note 206, at 239.

<sup>318</sup> See Tushnet, *supra* note 7, at 697.

<sup>319</sup> 538 U.S. at 388 (Thomas, J., dissenting).

opinion that a finding of intent to intimidate makes it essential to evaluate “all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.”<sup>320</sup> A key difference between Justice Thomas’s dissent and Justice O’Connor’s as well as Justice David Souter’s opinions lies in the role of standard and nonstandard meanings.<sup>321</sup> Whereas Justice Thomas focused on the standard meaning of cross burning that communicates intimidation based on racial hatred, Justices O’Connor and Souter respectively emphasized nonstandard interpretations.<sup>322</sup> This type of difference in interpretive focus was equally evident in interpretations of the Latin cross.<sup>323</sup> And, importantly for the distinction between images and words, Frederick Schauer argues that the result in Justice O’Connor and Justice Souter’s opinions would likely have been different if the case had dealt not with a visual but rather a textual message.<sup>324</sup>

In the flag burning cases, the Supreme Court, as one scholar put it, “seemed struck by the strange force of the flag as a visual symbol.”<sup>325</sup> The range of meanings possibly communicated by the flag thus played an important role, as the visual symbol’s various meanings could not be contained in a single message.<sup>326</sup> Interpretations of the Confederate flag offer a similar insight on varying interpretations of the symbol. Courts have struggled to define the line between the flag being a symbol of hate and a symbol of historical significance.<sup>327</sup>

We must distinguish how the observer sees, what the observer sees—a religious message or a secular message?—and how the observer interprets the possible effect of a religious message—endorsement?—that results from the display. Whenever there is communicative impact, two questions follow: first, whether the State is responsible for the message and, second, whether the impact is coercive, endorsing, or otherwise has an effect that the Establishment Clause prohibits.

<sup>320</sup> *Id.* at 367 (plurality opinion); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 432 (1992) (Stevens, J., concurring in the judgment) (discussing the message sent by cross burning in context).

<sup>321</sup> Schauer, *supra* note 138, at 223–24.

<sup>322</sup> *Id.*

<sup>323</sup> See *supra* notes 261–287 and accompanying text.

<sup>324</sup> Schauer, *supra* note 138, at 225–26 (using the textual message “We will lynch you just like we lynched your ancestors”).

<sup>325</sup> Adler, *supra* note 146, at 215.

<sup>326</sup> *Id.* (“Visual images by their nature cannot be confined.”).

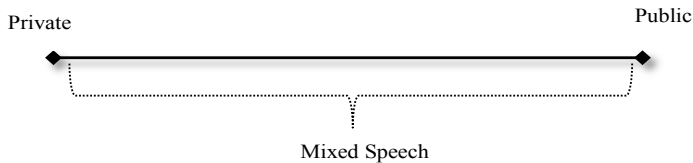
<sup>327</sup> Michael C. Dorf, *Same-Sex Marriage, Second Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1316–23 (2011) (discussing the Confederate battle flag); Zick, *supra* note 12, at 2291, 2350–54 (same); see, e.g., *Briggs v. Mississippi*, 331 F.3d 499, 506–08 (5th Cir. 2003) (holding that the Mississippi state flag—which incorporates the Confederate flag including a religious symbol, the St. Andrew’s Cross—does not violate the Establishment Clause); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (holding that the Equal Protection Clause is not violated by flying a Confederate flag over the state capitol); see also Haupt, *supra* note 100, at 621–23 (discussing “Sons of Confederate Veterans” license plates).

### B. Calibrating Communicative Impact

At a minimum, the Establishment Clause prohibits the State from adopting a religious identity as its own. Consequently, the Establishment Clause contains a content-based restriction on speech attributable to the government, prohibiting the State from communicating religious subject matter as an expression of its own religious identity or preference. In short, if the State may not have its own religious identity, it also may not communicate a religious identity.<sup>328</sup> Whether such an expression of identity results in coercion or endorsement is discussed in the next Section. For the time being, it bears emphasis that Establishment Clause constraints only apply to religious speech attributable to the state.

Considering the threshold question of attribution of the message to the State contextualizes the relationship between the message and its communicative impact. I have argued elsewhere that, for attribution purposes, religious speech is best conceptualized as situated between the end points of purely public and purely private speech on a mixed-speech continuum, as Figure 1 illustrates.<sup>329</sup>

Figure 1: The Mixed-Speech Continuum



Responsibility for speech, I have argued, should be assigned by assessing “effective control” over the speech.<sup>330</sup> The end-points designate pure private speech and pure government speech. At the private end of the spectrum, full free speech and free exercise protection applies; at the public end of the spectrum, Establishment Clause limits apply.<sup>331</sup> Along the continuum, control over the message shifts; as long as private control outweighs government control, the message is attributable to private speakers, with full Free Speech and Free Exercise Clause protection.<sup>332</sup> At the mid-point of truly hybrid speech, effective control is equally shared; here, I have argued, the underlying interests of the First Amendment require free speech protection of the message and simul-

<sup>328</sup> See *supra* notes 14–16 and accompanying text.

<sup>329</sup> Haupt, *supra* note 100, at 587–91 (discussing the idea of a mixed-speech continuum).

<sup>330</sup> *Id.*

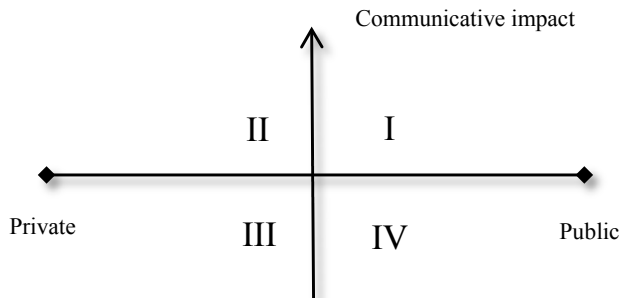
<sup>331</sup> *Id.* at 587.

<sup>332</sup> *Id.* at 589.

taneous imposition of Establishment Clause limits.<sup>333</sup> Once the State has effective control over the message, Establishment Clause constraints apply.<sup>334</sup>

Complementing this framework, we can conceptualize the mixed public-private speech continuum as the x-axis with the communicative impact scale as the y-axis as illustrated in Figure 2.

Figure 2: Communicative Impact and the Mixed-Speech Continuum



In terms of attribution, Quadrants I and IV represent instances in which the State has effective control over the message; accordingly, Establishment Clause limits apply. Quadrants II and III represent instances in which private speakers have effective control over the message; it is therefore fully protected by the Free Speech and Free Exercise Clause. Quadrants III and IV represent what we would term non-communicative in free speech terms.<sup>335</sup> Here, the message has no (discernible) religious content. To be sure, what is nonreligious may sometimes be difficult to determine. But for purposes of assessing the communicative impact of religious messages, such messages lack significance. Finally, we do not need to evaluate the communicative impact of messages falling into Quadrants II and III because the communicative impact of religious messages attributable to private speakers is not a concern. Such speech is fully protected as a matter of free speech and free exercise. As soon as we are concerned with religious messages attributable to the government, however, communicative impact matters. That is, once we have reached the point of at least truly hybrid speech on the mixed-speech continuum, we are concerned with the degree of communicative impact of the message. To be perfectly clear, this means that the following discussion will chiefly concern Quadrant I.

<sup>333</sup> *Id.* at 632–33 (explaining that in cases of truly hybrid speech, “the speech interests require a prohibition of viewpoint discrimination and simultaneous nonendorsement under the Establishment Clause”).

<sup>334</sup> *Id.* at 589–90.

<sup>335</sup> See *TRIBE*, *supra* note 306, § 12-2 (discussing communicative significance and communicative/noncommunicative distinction); Ely, *supra* note 306, 1489–90 (same).



A medium-neutral inquiry focuses on the communicative impact of the message conveyed rather than a distinction between textual and visual—or corresponding designation as active and passive—as it relates to the means of communication. Admittedly, this results in a significant line-drawing problem; but the line drawing rests on the degree of intensity of the message communicated, not the form of communication. Evaluating the message based on communicative impact corresponds to the normative question of at what point the State has assumed a distinct religious identity.

Medium neutrality means that some visual symbolic messages may have similarly low communicative impact as textual messages such as “under God,” “In God We Trust,” or “God save the United States and this Honorable Court.” These statements do not violate the Establishment Clause.<sup>336</sup> Similarly, visual messages may be deemed to have low communicative impact, as a result of their symbolic valence or strength of the religious message. Examples might include crosses in public buildings as an architectural feature, the frieze including the Ten Commandments at the Supreme Court,<sup>337</sup> or crosses in flags or coats of arms. Yet, the resulting permissibility under the Establishment Clause has little to do with their “passive” character but rather the low communicative impact of the religious message conveyed.

Where does the cognitive neuroscience matter? Calibrating communicative impact in light of the neuroscience data debunks the notion that visual religious symbols are somehow less powerful than text as an empirical matter, or “passive” due to their visual nature.<sup>338</sup> But the focus on communicative impact in a medium-neutral manner is a conceptual tool rather than an empirical proposal. In terms of relevancy for constitutional inquiry, there are limits on the lessons to be drawn from neuroscience. Neuroscience data does not provide a yardstick of constitutional wrong based on how individuals perceive visual representations of religious symbols. One might see some validation of the idea of a reasonable religious outsider as the reasonable person,<sup>339</sup> assuming

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<sup>336</sup> In dicta, current and former Supreme Court justices have indicated their approval for these and other forms of ceremonial deism. *See, e.g.,* *Town of Greece v. Galloway*, No. 12-696, slip op. at 22 (U.S. May 5, 2014) (Kagan, J., dissenting); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 887–93 (2005) (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in the judgment); *id.* at 35–36 (O’Connor, J., concurring in the judgment); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 624–25 (1989) (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 670–74 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 676–77 (1984); *id.* at 692–93 (O’Connor, J., concurring); *see also* Hill, *supra* note 127, at 717–20 (discussing Supreme Court cases addressing instances of ceremonial deism).

<sup>337</sup> *See* *Van Orden v. Perry*, 545 U.S. 677, 689–90 (2005) (plurality opinion).

<sup>338</sup> *See supra* notes 151–187 and accompanying text.

<sup>339</sup> *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1598 (2010) (arguing that government speech should be considered through the

that such a person would have a negatively charged reaction to religious symbols of groups other than their own. That negative reaction would have to rise to the level of feeling like an outsider in the political community, which is not measurable by gauging visual perception. But Establishment Clause theory and doctrine should take the broader lessons about visual perception into consideration as judges conduct the inquiry into communicative impact.

This does not preclude an empirics-driven solution at some future point. Several factors might be taken into account in determining the degree of communicative impact. A list might include spatial considerations such as size and location of the symbol, duration of exposure, religiosity, symbolic valence, and ambiguity. Unavoidable attention to a specific religious message also indicates a high degree of communicative impact; the message, of course, might be conveyed in textual or visual form. A bit lower on the communicative impact spectrum would be an avoidable religious message. And the lowest communicative impact results from a message that is not clearly religious, ambiguous, or commonly understood as nonreligious. To validate this list of factors, cognitive neuroscience research could potentially provide useful insights. If indeed a majority of individuals is affected in a certain way by these factors, they ought to be relevant in assessing the communicative impact of a message. We might be able to generate a presumption for different levels of communicative impact with respect to certain visual and textual symbolic messages in a variety of situations if we have an evidentiary basis; this evidentiary basis could conceivably be provided by future neuroscience research.

### *C. Coercion and Endorsement as Matters of Degree*

On the merits, Establishment Clause jurisprudence is notoriously unclear.<sup>340</sup> The Supreme Court's most recent major Establishment Clause opinion held the practice of legislative prayer at town board meetings to be constitutional.<sup>341</sup> Applying the resulting framework to religious symbols is the next important step in clarifying current uncertainties in Establishment Clause doctrine. The first step in determining the proper merits test for religious symbols is to end misconceptions about how images, and in particular visual religious symbols, communicate. This is a matter of empirical evidence. So far, the courts have guessed—and in light of the cognitive neuroscience data, guessed

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lens of a "religious outsider"); Hill, *supra* note 127, at 751; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) ("It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.").

<sup>340</sup> *See, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting from denial of certiorari) (urging the Court to "clean up our mess").

<sup>341</sup> *See Greece*, No. 12-696, slip op. at 1; *supra* note 34 and accompanying text.

wrongly—that visual representations of religious symbols are constitutionally less troublesome than textual ones. But this wrong guess should not be perpetuated in the doctrine. To the extent that coercion and endorsement matter, these approaches must equally engage the power of the visual and textual.

This Section reframes familiar themes of Establishment Clause doctrine on the merits, proceeding from the normative premise that the State may not adopt its own religious identity and communicate it, regardless if it seeks to enforce it by means of coercion or promote it by means of endorsement. This theory conceptualizes endorsement and coercion as matters of degree rather than kind. Notably, however, abandoning the false notion of “passive” symbols is not predicated on adopting this theory. Within the framework of an underlying theory of coercion or endorsement as alternative categories of state activity prohibited by the Establishment Clause, the implications of treating visual religious symbols as “active symbols” still apply. But reconceptualizing endorsement and coercion helps address issues of varying degrees of communicative impact that might otherwise be insufficiently analyzed. This is particularly relevant for communication at the margins that either falls between endorsement and coercion or under the rubric of mild endorsements.

Reconceptualizing endorsement and coercion as matters of degree, therefore, serves as a more accurate way to think about the impact of religious messages, regardless of the medium. Although courts need not abandon the labels of coercion and endorsement, the advantage of this conceptual tool is to integrate the two traditionally separate Establishment Clause inquiries into one. For both inquires, most important is the degree of communicative impact of the message. The existing labels correspond to different degrees of impact: coercion has high impact, endorsement has medium impact, and mild endorsements have low impact. The existent categories thus are consistent with this proposal. But the concept of endorsement and coercion as matters of degree provides a better account of the underlying concern: the communicative impact of the religious message conveyed, irrespective of its medium. Moreover, it does not invite the kind of sorting into active and passive that a distinction among endorsement and coercion as different in kind invites. A focus on the communicative impact of the message requires full attention to how a symbolic message communicates—whether visual or textual in nature.

Reconceptualizing endorsement and coercion as matters of degree starts from the premise that the state may not adopt a religion as its own and communicate that preference. This can conceivably be done in various degrees on a spectrum. The spectrum would range from a weak form of state identity, which would be communicated via endorsement of religious preferences, to a strong form of state identity, which would be communicated and, indeed, enforced by

coercion.<sup>342</sup> This approach renders the expansion of the coercion category unnecessary; it takes into account that some forms of coercion are stronger than others. It also helps provide an account of how some forms of endorsement might be considered as troublesome as coercion.

What does the communicative impact scale look like and how does it give guidance in deciding cases involving textual or visual religious symbols? In terms of degrees, the State might adopt its own religious preference and implement it by legal coercion at the far end. In this strong form of religious state identity, the State has adopted a particular religion as its own and forces its citizens into compliance. If the State demands that people act a certain way, it has adopted an orthodoxy that it seeks to impose on everyone, and asks everyone to actively subscribe to that orthodoxy and act accordingly. Coercion indicates a necessarily high degree of communicative impact. It demands participation in or at least compels attendance of religious practice. Yet when Justice Kennedy, for instance, speaks of “subtle coercive pressure” in *Lee v. Weisman*,<sup>343</sup> this suggests that degrees of communicative impact matter.

But coercion is not necessary to achieve a high level of communicative impact. As Justice Scalia concedes in his dissent in *Lee*, messages of endorsement may be as troublesome as legal coercion.<sup>344</sup> A relatively high degree of communicative impact can also be reached via endorsement; this represents a weaker form of the same idea, where the State wants to convince everyone to follow state religion by means other than coercion, such as overt proselytizing. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, Justice Kennedy took this into consideration when he discussed the noncoercive, yet apparently equally troublesome, cross atop a city hall.<sup>345</sup> In between, there are various conceivable degrees of endorsement indicating support for religious positions the State deems favorable.<sup>346</sup> A parallel to free speech might consider persuasive effect,<sup>347</sup> distinguishing the degree of persuasive/coercive force of the message. To pick up an example Douglas Laycock uses: “If a Christian cross

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<sup>342</sup> Cf. *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring) (“Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.”).

<sup>343</sup> *Id.* at 588 (majority opinion) (holding that “subtle coercive pressures” exist in an overt religious exercise in a secondary school environment where a student has no real alternative which would have allowed her to avoid the appearance of participation).

<sup>344</sup> *Id.* at 641 (Scalia, J., dissenting) (noting that the country’s constitutional tradition has “ruled out of order government-sponsored endorsement of religion”).

<sup>345</sup> 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting that a cross atop a city hall would violate the Establishment Clause because the symbolic recognition would place government weight behind a specific religion).

<sup>346</sup> See EISGRUBER & SAGER, *supra* note 284, at 138; 2 GREENAWALT, *supra* note 32, at 186.

<sup>347</sup> Kendrick, *supra* note 308, at 245–46 (discussing persuasion-related discrimination); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35 (1991).

has sufficient secular meaning to fall outside the Establishment Clause, then so might a sectarian prayer.”<sup>348</sup> The example illustrates the importance of assessing communicative impact irrespective of the medium.

At the low end of the communicative impact spectrum, this concept allows for recognition that some messages, though religious in nature, are “unprofound.”<sup>349</sup> To illustrate, recall *Van Orden v. Perry*, where Chief Justice Rehnquist compared a freestanding Ten Commandments monument to the visual depiction of Moses as a lawgiver among other lawgivers in the Supreme Court chamber’s frieze.<sup>350</sup> Although the same religious symbol is at issue, the degree of communicative impact is different. Thus, when Laycock discusses “enormous differences of degree” in various representations of the Ten Commandments,<sup>351</sup> the underlying concern is about communicative impact. But, as already emphasized, none of this depends on the form of communication; the communicative impact assessment applies to both visual and textual messages.

Thus, there may be textual messages with less communicative impact than visual messages. The motto “In God We Trust” may have less impact on the audience than sitting through a graduation ceremony at a church richly outfitted with religious imagery. Similarly, a short prayer at a graduation or in a legislature is over within seconds, while a cross by the side of a highway can easily and immediately be registered as such—even with the observer traveling at 55 mph<sup>352</sup>—and can trigger emotions accordingly. This results in significant communicative impact, and depending on the circumstances, the impact is perhaps as significant as a brief spoken prayer.

To illustrate, consider three examples: first, the graduation-at-church case; second, the graduation prayer case; and third, the case of legislative prayer. Following this conceptual framework, the en banc decision in the *Elmbrook* graduation-at-church case probably came out the right way, though for the wrong reason.<sup>353</sup> As discussed, the en banc majority in that case focused on the

<sup>348</sup> Laycock, *supra* note 47, at 1248.

<sup>349</sup> 2 GREENAWALT, *supra* note 32, at 91.

<sup>350</sup> 545 U.S. at 688 (plurality opinion) (noting the similarities between the two displays).

<sup>351</sup> Laycock, *supra* note 47, at 1220; *see also* EISGRUBER & SAGER, *supra* note 284, at 142–43 (contrasting the depiction of Moses in the Supreme Court frieze with other Ten Commandment monuments).

<sup>352</sup> *See* Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1112 (10th Cir. 2010) (“Because generally drivers would be passing a memorial at 55-plus miles per hour, the UHPA determined that the cross memorials ‘needed to prominently communicate all of this instantaneously.’”); *id.* at 1121 (noting that although a motorist driving by at 55-plus miles per hour may not notice the biographical information on the memorial cross, the motorist would be “bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to the religious sign”).

<sup>353</sup> *Elmbrook II*, 687 F.3d 840, 856 (7th Cir. 2012) (en banc) (holding that conducting a graduation ceremony in a church violates the Establishment Clause).

textual elements in the church.<sup>354</sup> Giving the visual symbol of the cross short shrift is an indicator of the hierarchy of words over images implicit in many religious symbol cases. But paying close attention to the communicative impact of the cross itself—the duration of exposure of the audience, the spatial setup with the cross as the centerpiece, the lack of ambiguity in the message conveyed by the cross given the spatial dimension—makes it a powerful vehicle for a religious message. Indeed, it might be a more powerful vehicle than a short, nondenominational textual prayer as the one at issue in *Lee*.<sup>355</sup> Thus, a focus on the symbol itself, rather than the textual surroundings that supplemented it, would likely have led to the same outcome, but with a rationale that pays heed to a medium-neutral evaluation of communicative impact of the message.

This assessment does not necessarily place all other graduation-at-church scenarios in the same category of relatively high communicative impact. In *Elmbrook*, a high degree of communicative impact resulted from the presence of the cross and its surroundings, richly outfitted with other religious symbols. A lesser degree of communicative impact would be achieved in an unadorned church building; this, of course, relates back to interpreting the cultural meaning.<sup>356</sup> In terms of placing the message on the communicative impact spectrum, however, we are here only dealing with matters of degree when the religious nature of the message is clear. A low degree would be achieved if the graduation ceremony took place in a building owned by a religious group that did not function as a site of worship.

The medium-neutral assessment guided by the communicative impact of the message likewise applies to textual religious messages. In the graduation prayer case, the length of the prayer and its denominational valence can increase or decrease its communicative impact. In the school context, moreover, compelled attendance (whether direct or indirect) places school-related activities closer toward the coercion side.

The final example, legislative prayer, illustrates how the mixed-speech continuum—the x-axis—relates to the communicative impact spectrum.<sup>357</sup> Responsibility for the speech may shift along the x-axis. If a member of the legislative body or a paid chaplain—as in *Marsh v. Chambers*—offers the prayer, such ac-

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<sup>354</sup> *Id.* at 852–53 (noting that the numerous pamphlets and other persuasive literature contributed to a finding that the selected location violated the Establishment Clause); see *supra* notes 112–117 and accompanying text.

<sup>355</sup> See 505 U.S. at 578–79 (holding that a nonsectarian prayer at an official public school graduation ceremony imposes a high risk of compulsion and therefore violates the Establishment Clause).

<sup>356</sup> See *supra* notes 239–299 and accompanying text.

<sup>357</sup> To a lesser extent, a similar shift along the x-axis can occur in the context of graduation prayer if the prayer is offered by students. In the public school setting, however, the State generally retains a high degree of control over the message. See Haupt, *supra* note 100, at 592–93.

tions would be situated on the government speech end.<sup>358</sup> Conceivably, however, the legislative body can open participation to other members of the community—as the town board did in *Town of Greece v. Galloway*—inviting a rotating selection of speakers or (though highly unlikely to happen in practice<sup>359</sup>) even creating a public forum. Doing so would push the speech further toward the private end of the continuum as effective control over the message shifts.<sup>360</sup> On the communicative impact spectrum—the y-axis—the degree of impact can shift from coercion to lesser forms of noncoercive, yet high impact, to low impact. A clearly impermissible coercive practice might entail prayer by a member of the legislative body or a paid chaplain where attendance of the meeting is required (in such a case, moreover, the Free Exercise clause would certainly require an opt-out). A noncoercive practice of legislative prayer may also vary in its communicative impact. Notably, *Marsh* and *Greece* recognized that at some point, otherwise permissible legislative prayer could become impermissible.<sup>361</sup> The idea of degrees of impact tracks closely with these concerns.

To illustrate, consider the different degrees of impact if a legislative body adopts a policy, whereby at the beginning of the term all members vote in a secret ballot whether to: (a) open the session without any specified activity; (b) open the session with some purely civic activity (though the reference to God in the Pledge might already complicate matters); (c) hold a minute of silence; (d) say a nonsectarian prayer; or (e) pray in the name of Jesus.<sup>362</sup> Assuming a truly secret and unanimous vote, there is no free exercise violation. Under a strict coercion theory, there would be no Establishment Clause violation if attendees are given an opt-out.<sup>363</sup> But seen on the communicative impact spectrum, other factors to be taken into consideration would include whether there

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<sup>358</sup> See 463 U.S. 783, 792–95 (1983) (holding that the practice of opening legislative sessions with prayer by a chaplain paid by the state does not violate the Establishment Clause because it is simply an acknowledgement of widely held beliefs); Haupt, *supra* note 100, at 616–17.

<sup>359</sup> See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1030 (2010) (arguing that although the public-forum concept can solve the problems associated with legislative prayer, the idea will not work because no government will likely be willing to give up control over legislative prayer).

<sup>360</sup> Haupt, *supra* note 100, at 617–18.

<sup>361</sup> See *Greece*, No. 12-696, slip op. at 14–15 (“If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.”); *Marsh*, 463 U.S. at 794 (noting that indications that a prayer opportunity was exploited to advance or disparage one particular faith may render legislative prayers impermissible).

<sup>362</sup> Cf. Lund, *supra* note 359, at 1002 (discussing what makes legislative prayer more or less sectarian).

<sup>363</sup> See *Greece*, No. 12-696, slip op. at 22 (discussing the possibility of members of the public “leaving the meeting room during the prayer, arriving late, or even . . . making a later protest”); cf. *Lee*, 505 U.S. at 588 (noting that coercive pressures exist where an individual is left with no real alternative which would have allowed them to avoid the fact or appearance of participation).

is an audience<sup>364</sup> or even whether the opening remarks are included in the legislative record.

These examples illustrate that conceptualizing coercion and endorsement as matters of degree along a communicative impact spectrum more accurately tracks changes in the message than does a single rule for legislative prayer, graduation prayer, or graduations held in houses of worship. Most importantly, in all instances the degree of impact is not contingent on the medium by which the message is conveyed.

## CONCLUSION

Establishment Clause cases initially shifted from money to messages; within the latter, there is now a noticeable shift from textual to visual messages.<sup>365</sup> Contemporary Establishment Clause theory and doctrine still privileges the written or spoken word though an increasing number of high-profile cases now involve visual representations of religious imagery. In an era when visuals “increasingly dominate our culture,”<sup>366</sup> scholars have detected a “changing legal culture” when it comes to the role of images in the law.<sup>367</sup> Heightened sensibility with respect to visual representations would benefit Establishment Clause analysis of religious symbols as well.

As Justice Breyer articulated, judges typically lack the social science training to evaluate empirical findings, such as neuroscience.<sup>368</sup> Erroneously designating religious imagery as merely “passive” is a case in point. As this Article has demonstrated, religious symbols are not “passive;” visual religious symbols can be as active as—if not sometimes more active than—textual religious speech. Insights from neuroscience are gaining importance in a wide variety of areas of the law; Establishment Clause theory and doctrine should likewise benefit from these insights. Arguably, “[t]he legal academy has yet seriously to come to grips with the changes that this infusion of the visual means for legal thinking and rhetoric.”<sup>369</sup> Likewise, dealing with visual repre-

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<sup>364</sup> See *Greece*, No. 12-696, slip op. at 12–13 (Kagan, J., dissenting).

<sup>365</sup> Lupu, *supra* note 24, at 773.

<sup>366</sup> FEIGENSON & SPIESEL, *supra* note 7, at 2; see also Zick, *supra* note 12, at 2263 (“We live in a culture of symbols.”).

<sup>367</sup> FEIGENSON & SPIESEL, *supra* note 7, at xi–xii (focusing on the role of digital pictures and multimedia in the courtroom).

<sup>368</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2769 (2010) (Breyer, J., dissenting).

<sup>369</sup> Spiesel, *supra* note 23, at 391; see also FEIGENSON & SPIESEL, *supra* note 7, at xi (“Understanding [pictures] requires new skills. That’s unsettling to many lawyers and judges; law school doesn’t train them to deal with pictures, and their experiences in practice may not have prepared them well, either.”); Sanger, *supra* note 148, at 361 (“[T]here has been no considered study of the role of visuality in law.”). The diverging results in cases involving the constitutionality of compelled visual speech underscore the legal uncertainty that currently accompanies visual images. See Corbin, *supra*



sentations in the area of religious symbols requires an appreciation for the nature of images. If, for instance, Judge Posner is “invit[ing] a new jurisprudence of iconography,”<sup>370</sup> a good starting point to assess Establishment Clause jurisprudence as it relates to religious symbols is to look to other fields that teach us how images communicate.

Judicial decisions dismissing the visual as merely passive are based on a misconception of how visual images communicate. The data provided in this discussion refutes the notion that visuals are passive and supports the notion that they are at least as active as words. For someone who intuitively agrees with the old adage that “a picture is worth a thousand words,” the neuroscience discussion may seem superfluous. But it matters because it provides data empirically confirming the intuition.

There is a larger trend in the law that has led to a re-examination of the role of images as distinct from words. Establishment Clause theory as it concerns religious symbols must sufficiently account for the communicative impact of visuals. Reconceptualizing endorsement and coercion as matters of degree focuses attention on the communicative impact of the message. It discards misleading labels and categorizations, such as the notion of “passive” symbols, in favor of a comprehensive approach to religious symbolic messages irrespective of the medium by which they are communicated. After the Supreme Court has now revisited the textual by affirming the permissibility of legislative prayer, scholarship concerned with the future of the Establishment Clause must consider how the resulting doctrinal structure might apply to the role of religious symbols. A medium-neutral approach within a framework of communicative impact provides an appropriate theoretical basis.

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note 7, at 10 (“Mandatory cigarette graphics have been struck but mandatory abortion ultrasounds have been upheld.”).

<sup>370</sup> *Elmbrook II*, 687 F.3d at 857 (Hamilton, J., concurring).

